83-135

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 1983

ERCELL GIVENS, *Petitioner*

v.

PAULINA CASTILLO, ET AL., *Respondents*

Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

MOREHEAD, SHARP & TISDEL
P. O. Box 1600
Plainview, Texas 79072

Tom S. Milam
Cecil Kuhne
CRENSHAW, DUPREE & MILAM
P. O. Box 1499
Lubbock, Texas 79408

Attorneys for Petitioner

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

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v.

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Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES Ercell Givens, Petitioner, and submits his Petition for Writ of Certiorari and would respectfully show the following:

QUESTIONS PRESENTED FOR REVIEW

1.

The Court of Appeals erred in holding that as a matter of law Manuel Tonche was an employee of the Defendant and in also holding that as a matter of law Manuel Tonche was a farm labor contractor under *7 U.S.C. Sec. 2042(b).* Such holdings are inconsistent and conflicting and Manuel Tonche could not

have been both an employee of the Defendant and a farm labor contractor at the same time.

2.

The Court of Appeals erred in disregarding the jury findings that Manuel Tonche was an independent contractor and the plaintiffs were not employees of Defendant and in holding that the employees hired by Manuel Tonche to hoe weeds on the farm of Defendants were employees of Defendant under the FLSA, as a matter of law, there being ample and abundant evidence to support the jury findings that Manuel Tonche was an independent contractor and the Plaintiffs were not employees of the Defendant.

3.

The Court of Appeals erred in disregarding the jury finding that the failure of Defendant to pay the minimum wage required by law to Plaintiffs in 1977 and 1978 was not willful and in holding that there was a willful violation of the minimum wage provisions of the FLSA by Defendant as a matter of law, there being ample and abundant evidence to support the jury findings that the failure of Defendant to pay the minimum wage required by law to Plaintiffs in 1977 and 1978 was not willful.

4.

The Court of Appeals erred in disregarding the jury finding that Manuel Tonche was not a farm labor contractor and in holding that Manuel Tonche was a farm labor contractor, as a matter of law, there being ample and abundant evidence to support the jury finding that Manuel Tonche was not a farm labor contractor.

5.

The Court of Appeals erred in disregarding the jury finding that Defendant did not fail to obtain and maintain payroll records of Plaintiffs furnished to him to hoe cotton in 1977 and 1978 and in holding that there was not only a violation of the record keeping provisions of the FLCRA but also a willful violation of the record keeping provisions of the FLCRA by Defendant, as a matter of law, there being ample and abundant evidence to support the jury finding that Defendant did not fail to obtain and maintain payroll records and there was not a willful violation of the record keeping provisions of the FLCRA.

6.

Alternatively, the Court of Appeals erred in refusing to simply reverse and render judgment for Plaintiff for the sum of $10,907.76 based upon the hours found by the jury to have been worked by Plaintiffs in 1977 and 1978. (804.5 hours found by the jury under Special Issue 4 times $2.20 equals $769.90 plus 3,448.25 hours found by the jury in Special Issue 5 times $2.65 equaling $9,137.86).

LIST OF NAMES OF ALL PARTIES

The following listed parties have an interest in the outcome of this case:

Petitioner:

Ercell Givens

Respondents:

Paulina Castillo
Francisca Contreras
Betty Lou Contreras
Mary Esmeralda Contreras
Rodolfo Valentin Ramos
Refugia Gamez
Rosa Garcia
Linda Garcia
Oscar Garcia
Aida Garcia
Rosa Linda Pantoja
Pauline Pantoja
Margarita Rodriguez
Paula Piojas
Petra Soliz
Juanita Tonche
Johnny Tonche
Jessie Tonche
Edna Montejano
Manuel Tonche (Deceased)
Eva Arriola
Georgina Contreras
Mary Lee Contreras
Maria Elena Aguilar Contreras
Florentino Ramos
Hilario Garcia
Sylvia Garcia
Ismael Garcia
Artemio Garcia
Manuel Pantoja
Margarita Pantoja
Pauline Sue Pantoja
Johnny Riojas
Sally Ruiz
Glanca Estella Valles
Elizabeth Tonche
Adam Tonche
Candelaria Tonche
Reymundo Arriola

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REFERENCE TO OFFICIAL REPORTS OF OPINION OF COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been reported in the Federal Reporter (Second Series) but a copy of the Court's opinion is contained in the Appendix to this Petition.

Also contained in the Appendix is a copy of the Judgment of the District Court dated June 19, 1981 and a copy of the Order of the District Court dated October 7, 1981 overruling Plaintiff's Motion to Alter Judgment, for Judgment n.o.v. and for Partial New Trial.

STATEMENT OF GROUNDS OF JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for the Fifth Circuit dated and entered May 6, 1983 reversing and remanding the judgment of the district court.

Ercell Givens, Petitioner here, filed a Petition for Rehearing in the United States Court of Appeals for the Fifth Circuit which was overruled by such Court on June 16, 1983.

Jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit by Writ of Certiorari is conferred upon this Court by the provisions of *28 U.S.C. Sec. 1254(1).*

The Federal District Court had jurisdiction of this case under *28 U.S.C. Sec. 1331.*

STATUTORY PROVISIONS INVOLVED

This case involves claims by Plaintiffs under the minimum wage provisions of the Fair Labor Standards Act and claims under the Farm Labor Contractor Registration Act.

The provisions of such statutes primarily involved are noted here and the text of such statutory provisions are set out verbatim in the Appendix attached to this Petition.

The provisions of the FLSA involved are *29 U.S.C. Sec. 203(d); Sec. 203(e)(1); Sec. 206(a); Sec. 211(c)* and *Sec. 255(a).*

The provisions of the Farm Labor Contractor Registration Act involved are *7 U.S.C. Sec. 2042(b) and (c); Sec. 2045(e),* and *Sec. 2048.*

STATEMENT OF THE CASE

The Federal District Court had jurisdiction of this case under *28 U.S.C. Sec. 1331,* Federal Question Jurisdiction.

This action was filed by Paulina Castillo, et al, alleging that they had performed farm labor as "employees" of Defendant, Ercell Givens during the 1977 and 1978 agricultural seasons. This suit was filed on February 14, 1980. Plaintiffs sought damages for Defendant's alleged failure to pay minimum wage in violation of the Fair Labor Standards Act (*29 U.S.C. §201, et seq.*) (R. 1-3) (FLSA).

Plaintiff also claimed violation of the record keeping provisions of the Farm Labor Contractor Registration Act (FLCRA).

Defendant denied the truth of the allegations of Plaintiffs' Complaint and further alleged that the claims of Plaintiffs herein were barred in whole or in part by the pertinent statute of limitations (R. 48-49).

The case was tried to a jury and submitted on special issues in response to which the jury found:

(1) Plaintiffs were not engaged in the production of goods for commerce.

(2) Plaintiffs were not employees of Defendant.

(3) The failure of Defendant to pay the minimum wage required by law to Plaintiffs was not willful in the year 1977 and was not willful in the year 1978.

(4) The jury made findings with respect to each of the 26 listed Plaintiffs as to the number of hours or "none" that such Plaintiffs worked hoeing Defendant's cotton in 1977.

(5) The jury made findings with respect to each of the 32 listed Plaintiffs as to the number of hours or "none" that such Plaintiffs worked hoeing Defendant's cotton in 1978.

(6) Plaintiffs were not migrant workers.

(7) Manuel Tonche was not a farm labor contractor.

(8) Defendant did not fail to obtain and maintain payroll records of the Plaintiffs furnished to him to hoe cotton in 1977 and 1978 which showed the listed information for such worker.

(9) Defendant's failure to comply with the Farm Labor Registration Act (if you have so found) was not intentional (R. 316-326).

In its order accompanying the judgment the district court stated that it did not appear that the jury's finding to Special Issue 1 relating to production of goods for commerce was supported by the evidence, but held that even if Plaintiffs prevail on this issue there is sufficient evidence to support the jury's finding that Plaintiffs were not employees of Defendant and this would preclude Plaintiffs' recovery under the FLSA (R. 398).

The district court also stated that it did not appear that the evidence supported the jury's answer to Special Issue 6 (refusing to find that Plaintiffs were migrant workers) but stated that the evidence does support the answer to Special Issue 7 (that Manuel Tonche was not a farm labor contractor as defined by FLCRA) and such finding precluded Plaintiffs' recovery under the FLCRA (R. 399).

Based upon the jury verdict the trial court rendered take nothing judgment in favor of Defendant (R. 327).

The Court of Appeals disregarded all of the jury findings favorable to Defendant and held as a matter of law that Manuel Tonche was not an independent contractor but was an employee of the Defendant; that the Plaintiffs who were hired

by Manuel Tonche were employees of Defendant; that Defendant in essence should have known that the FLSA was applicable and willfully violated the FLSA; that Manuel Tonche was a farm labor contractor under the FLCRA; that Defendant failed to keep records required by the FLCRA and that such failure was willful.

The circuit court also held that the district court improperly instructed the jury with respect to burden of proof and set aside the jury findings to Special Issues 4 and 5 with respect to the number of hours that the various Plaintiffs worked hoeing Defendant's cotton in 1977 and 1978, if any, and remanded the case to the district court for a retrial of such issues as to the hours worked by Plaintiffs.

The parties will be primarily referred to herein by their designation in the trial court. Plaintiffs will sometimes be referred to in the singular.

ARGUMENT

It is fundamental that the credibility of witnesses and weight to be given to their testimony are matters within the province of the jury, that findings of fact may not be set aside by the appellate courts on the ground that the court itself sitting as finder of fact would have reached a different result, and the jury findings must be upheld if supported by substantial evidence. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 7 L.Ed.2d 798 (2) (1962) rehearing denied, 369 U.S. 882, 8 L.Ed.2d 284; *Dennis v. Denver & Rio Grande Western R. Co.*, 375 U.S. 208, 11 L.Ed.2d 256 (2) (1963).

We submit that in the case at bar there is not only substantial evidence, but ample and abundant evidence to support the jury's findings and there was no basis for the Court of Appeals' action in disregarding the jury findings and holding that all elements of Plaintiffs' claim (with the exception of the number

of hours worked, which findings the Court of Appeals also disregarded) were established by Plaintiffs as a matter of law.

In this connection, and before discussing the cases and evidence supporting the jury findings, it should be noted that the Court of Appeals' "findings" with respect to the status of Manuel Tonche are in themselves totally inconsistent and conflicting.

The Court of Appeals first held that as a matter of law Manuel Tonche was not an independent contractor but was only an employee of the Defendant, Ercell Givens. The Court also subsequently held that as a matter of law Manuel Tonche was a farm labor contractor under *7 U.S.C. Sec. 2042(b)*.

Manuel Tonche cannot be a "contractor" and "not be a contractor" at the same time. This inconsistency also highlights the extent to which the Court of Appeals went in disregarding the jury findings and all contrary evidence in order to conclude that Plaintiffs had established all claims against Defendant, all as a matter of law.

We would first refer the Court to the evidence supporting the jury findings with respect to Plaintiffs' claim under the Fair Labor Standards Act and the "grounds" relied upon by the Court of Appeals for disregarding such findings.

In order for the minimum wage provisions of the Fair Labor Standards Act to apply, Defendant must of course be an "employer" and Plaintiffs must be an "employee" under the provisions of the Act. *29 U.S.C. Sec. 206(a)*.

Both the term "employer" and "employee" are broadly defined in the Act. *26 U.S.C. Sec. 203(d)* and *Sec. 203(e)(1)*.

While common law principles with respect to determining whether an employee or an independent contractor relationship exists are not conclusive, they are relevant and material to determination of such issues under the FLSA. *Wabash Radio Corp. v. Walling*, 162 F.2d 391 (1) (6th Cir. 1947); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (2) (9th Cir. 1979); *Sims v. Parke Davis Co.*, 334 F.Supp. 774, 783

(E.D. Mich. 1971) affirmed 453 F.2d 1259 (6th Cir. 1971) cert. denied 405 U.S. 978; *Walling v. American Needlecrafts*, 46 F.Supp. 16 (4, 5, 7) (W.D. Ky. 1942) reversed on other grounds 130 F.2d 60 (6th Cir. 1943).

In *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979), *supra*, the court said (p.754):

> "The courts have identified a number of factors which may be useful in distinguishing employees from independent contractors for purposes of social legislation such as the F.L.S.A."

The court then lists some six factors including the degree of the alleged employer's right to control the manner in which the work is to be performed, the alleged employee's opportunity for profit or loss depending upon his managerial skill, the alleged employee's investment in equipment or materials or his employment of helpers and the degree of permanence of the work relationship.

The court noted that the list was not exhaustive but summarized the factors which the Supreme Court deemed relevant to this problem in *Bartels v. Birmingham*, 332 U.S. 126, 91 L.Ed. 1947 (1947); *United States v. Silk*, 331 U.S. 704, 716, 91 L.Ed. 1757 (1947) and *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 91 L.Ed. 1772 (1947).

In the case at bar the undisputed evidence showed that Plaintiff hired Mr. Tonche to have his cotton hoed as he had done every year since about 1975 (Tr 169-172, 177, 178, 215).

Defendant's only direction and control over the work was that he showed Mr. Tonche the fields which he wanted hoed and told Mr. Tonche that he wanted all weeds hoed other than Johnson Grass and blue weeds (Tr 169-172, 177, 178, 190-191). Defendant would go into the fields some two or three times a week to see how the work was progressing and to see if Mr. Tonche was doing a good job (Tr 186, 189, 175, 180).

It is undisputed that Mr. Tonche hired and fired all of the hoers, furnished hoes and equipment to all of the hoers, furnished transportation as was necessary to any of the hoers desiring transportation, directed the time that the hoers would come to work and leave and directed all of the details of the performance of the work.

It is likewise undisputed that Defendant did not pay any of the hoers; Defendant paid Mr. Tonche at the end of each week based upon records and calculations kept by Mr. Tonche; Mr. Tonche paid each of the hoers that he employed. Defendant did not even know how much Mr. Tonche paid the people whom Manuel Tonche employed (Tr 175, 180, 182, 195-196, 270-273, 287, 330, 332, 334, 336, 337, 361-363, 367, 384-385, 388, 390, 411, 437-439, 474-478, 488-490, 499, 501, 508, 509-510, 527, 540, 559, 561, 580, 589, 600-601, 606, 609, 615, 629-630, 637, 638, 645, 660).

The Court of Appeals held that Manuel Tonche was only an employee and not an independent contractor as a matter of law on the grounds, in essence, that Defendant told Manuel Tonche which fields were to be hoed, the worked performed by the employees of Manuel Tonche was not skilled labor, and that Manuel Tonche could not have been in business for himself since he had only a second grade education.

We submit that such holding is wholly without merit.

First, Defendant's direction as to which fields were to be hoed constituted only directions by Defendant of the job to be performed and did not constitute directions as to details of the performance of such job.

Secondly, the fact that skilled labor was not required constitutes only one of numerous elements to be considered.

Thirdly, the fact that a person does not have a high level or degree of formal education does not, as a matter of law, compel the holding that "as a matter of economic fact" such person cannot be in business for himself.

It is also undisputed that the time for hoeing cotton lasts only a relatively short time and there is no requirement that Manuel Tonche perform such work all year around in order to qualify as an independent contractor.

It is also important to note that there is no evidence that Manuel Tonche was in any way restricted to hiring employees to hoe weeds on the fields of Defendant or that he could not have contracted for the hoeing of weeds for any other farmer in the area if he so desired.

As noted above, the Court of Appeals, in holding that Manuel Tonche was only an employee of Defendant, totally disregarded and ignored the undisputed evidence that Mr. Tonche hired, fired and paid all employees, directed the hours of work, details of performance of their work, furnished all equipment and all transportation required, etc., which evidence the jury was clearly entitled to consider in determining that Plaintiffs were not employees of the Defendant (but were employees of Manuel Tonche, an independent contractor).

There are numerous cases in which the evidence is not nearly as strong and compelling in support of the findings that Plaintiffs were not employees of Defendant in which the appellate courts have upheld such findings. The cases of *Mitchell v. Hertzke*, 234 F.2d 183 (10th Cir. 1956) and *Wirtz v. Kneece*, 249 F.Supp. 564 (D.S.C. 1966) involve closely analogous fact situations.

See also *Walling v. Twyeffort*, 158 F.2d 944, 948 (3) (2nd Cir. 1947); *Howard v. Executive Leasing Co.*, 343 F.Supp. 274 (E.D. Mo. 1972) affirmed 475 F.2d 1408 (8th Cir. 1973) and *Tobin v. Cherry River Boom & Lumber Co.*, 102 F.Supp. 763 (1) (S.D. W.Va. 1952).

The Court of Appeals further held that Defendant's failure to pay minimum wage to the employees of Manuel Tonche constituted a willful violation of the FLSA by Defendant as a matter of law.

We submit that such holding is erroneous for several reasons.

First, as already discussed above, there was abundant evidence in this case that the Plaintiffs were not in fact employees of Defendant at all but were employees of Manuel Tonche, with whom Plaintiff contracted in the belief that he was retaining Manuel Tonche to hoe his fields as an independent contractor.

Defendant testified that when contracting with Mr. Tonche to have his fields hoed he suggested and offered to pay Mr. Tonche by the acre but Mr. Tonche stated that he would rather compute the time of his workers and be paid on this basis (Tr 195-196).

Also, as noted above, Defendant did not know the number of people working for Mr. Tonche, the hours worked or what Mr. Tonche was paying them. He simply paid Mr. Tonche on a weekly basis based upon the amount computed by Mr. Tonche from the records which Mr. Tonche kept; and Mr. Tonche paid all of his workers himself.

Defendant specifically testified that he did not know that he was under the minimum wage law in contracting with Mr. Tonche for this work (Tr 215). See also Tr 276-277, 745-746, 748).

The Court of Appeals in its opinion recognized the test for willful violation of the Act as stated in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971) cert. denied 409 U.S. 948 as follows (p. 1142):

> "Did the employer *know* that the F.L.S.A. was in the picture?" (emphasis ours).

In *Dowd v. Blackstone Cleaners, Inc.*, 306 F.Supp. 1276 (4) (N.D.Tex. 1969) the court stated (p. 1281):

> "To be willful, the violation must be shown to be deliberate, voluntary and intentional as distinguished from one

committed through inadvertance, accident, or ordinary negligence." (citing numerous authorities).

However, while purporting to affirm and follow the *Coleman* case the Court of Appeals has in fact greatly broadened the standard from that requiring that the Defendant "know" that the FLSA was in the picture to one in which the Defendant "should have known" that the FLSA was in the picture.

It is undisputed, from Defendant's own testimony, that he did not "know" that the FLSA was in the picture and the Court of Appeals has held in essence that Defendant was guilty of a willful violation of the FLSA in this case because he "should have known," *as a matter of law*, that the Fair Labor Standards Act was applicable and that Plaintiffs were his employees and were under such Act.

The Court of Appeals also refers to the DOL investigation and determination that Defendant owed back wages under the FLSA. In this connection, Defendant specifically testified that the first knowledge he had that there was any claim by the government that the minimum wage law applied to the employees of Manuel Tonche was on September 1, 1978 (Tr 744). This was after Defendant is alleged to have violated the FLSA (in the summer of 1977 and 1978).

The Court of Appeals similarly applied a much broader definition of intentional violation of the FLCRA than that recognized or applied in any previous decisions including those cited by the Court.

The Court of Appeals cites *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217 (7th Cir. 1981) for its holding that although the term "intentional" (in *7 U.S.C. Sec. 2050a(b)*) does not require a specific intent to violate the Act, the term does mean "conscious or deliberate."

There is no evidence of probative weight in this case that either Defendant or Manuel Tonche "consciously or deliberately" violated the provisions of the F.L.C.R.A. (and the

undisputed evidence in fact establishes that Manuel Tonche did maintain written records of the employees' hours, etc.) and certainly the evidence does not establish that either Defendant or Manuel Tonche consciously or deliberately violated the provisions of the F.L.C.R.A. as a matter of law.

The Court of Appeals also held that the district court's instruction in effect improperly placed the burden of proof of Special Issues 4 and 5 on the Plaintiffs rather than on Defendant.

The Plaintiffs did not object to the district court's charge with respect to such instruction and we submit that such instruction is not erroneous and did not mislead the jury into believing that the burden of proof on Special Issues 4 and 5 was on the Plaintiff.

The instruction referred to by the Court of Appeals as erroneously placing the burden of proof was the following:

> "It is the duty of the employer to keep and maintain accurate records of the number of hours that an employee works for said employer and it is not the duty of the employee to keep such records."

Such instruction clearly advises the jury that it is the employer and not the employee who has the duty to keep records of the number of hours worked and the jury was therefore in effect fully advised as to the burden of proof with respect to Special Issues 4 and 5.

Petitioner further submits, in the alternative, that the Court of Appeals clearly erred in setting aside the jury findings as to the hours worked by various Plaintiffs in 1977 and 1978 (in response to Special Issues 4 and 5) and in remanding the case for a retrial of such issues and that in the event this Court does not reverse the judgment of the Court of Appeals and affirm the judgment of the district court, this Court should in any event reverse and render judgment for Plaintiffs for the amount of $10,907.76 in accordance with the jury

findings under Special Issues 4 and 5. In Special Issue 4 (inquiring as to 1977) the jury found a total of 804.5 hours which, at $2.20 an hour equals $769.90. In response to Special Issue 5 (inquiring as to 1978) the jury found a total of 3,448.25 hours, which at $2.65 an hour totals $9,137.86.

CONCLUSION

For the reasons and based upon the authorities above cited, Petitioner submits the Court of Appeals for the Fifth Circuit erroneously states the law with respect to the FLSA and FLCRA and the Court erroneously reversed the judgment of the district court based on the jury verdict.

There was ample evidence to support the jury findings for Defendant and the Court of Appeals erred in setting aside and disregarding such findings, and making contrary findings as a matter of law.

The Court of Appeals also erred in holding, as a matter of law, that Manuel Tonche was both an independent contractor and an employee of Defendant, Givens, at the same time and such findings are totally inconsistent and Manuel Tonche could not be both an independent contractor and an employee at the same time.

Furthermore, the Court of Appeals has in effect extended the previous rule of willful violation of the Fair Labor Standards Act from one in which the employer is required to "know" that the FLSA is in the picture from one in which the employer is liable if he "should have known" that the FLSA was in the picture.

Furthermore, the Court of Appeals has in effect ignored the prior decisions that an intentional violation of the FLCRA requires a "conscious or deliberate" violation and the evidence is undisputed in the case at bar that there was no conscious or deliberate violation.

WHEREFORE, Petitioner prays that this Court grant his Petition for Certiorari and that upon full hearing this Court enter judgment reversing the judgment of the United States Court of Appeals for the Fifth Circuit and affirm the judgment of the district court. Alternatively, Petitioner prays that the Court reverse and render judgment for Plaintiffs for $10,907.76.

Respectfully submitted,

MOREHEAD, SHARP & TISDEL
P.O. Box 1600
Plainview, Texas 79072

Tom S. Milam
Cecil Kuhne
CRENSHAW, DUPREE
& MILAM
P.O. Box 1499
Lubbock, Texas 79408

By Tom S. Milam
Tom S. Milam
Texas Bar #14035000

By Cecil Kuhne
Cecil Kuhne
Texas Bar #11760000

Attorneys for Petitioner

CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Petition for Writ of Certiorari have been mailed on this the 21st day of July, 1983 to:

Edward J. Tuddenham
Texas Rural Legal Aid, Inc.
P.O. Box 2223
Hereford, Texas 79045

Solicitor General
Department of Justice
Washington, D.C. 20530

MOREHEAD, SHARP & TISDEL
CRENSHAW, DUPREE
& MILAM

By Tom S. Milam
Attorneys for Petitioner

APPENDIX

Paulina CASTILLO, et al.,
Plaintiffs-Appellants,

v.

Ercell GIVENS, Defendant-Appellee.

No. 81-1520.

United States Court of Appeals,
Fifth Circuit.

May 6, 1983.

Field workers brought action against farm owner under Fair Labor Standards Act for unpaid minimum wages and liquidated damages and also under Farm Labor Contractor Registration Act for liquidated damages. The United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge, entered judgment for farm owner on both claims, and workers appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) person who farm owner hired to procure and supervise field workers to chop cotton was an employee of farm owner for purposes of Fair Labor Standards Act and therefore field workers were also employees of farm owner for purposes of the Act; (2) violations of Fair Labor Standards Act by farm owner were willful within meaning of three-year statute of limitations for willful violations of the Act; and (3) farm owner violated Farm Labor Contractor Registration Act by not maintaining payroll records on his field workers and those violations were intentional within meaning of Act.

Reversed and remanded.

Higginbotham, Circuit Judge, specially concurred and filed opinion.

1. Labor Relations [Key]1562

Ultimate conclusion that an individual is am "employee" within meaning of Fair Labor Standards Act is a legal determination rather than a factual one. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

2. Labor Relations [Key]1121

Person who farm owner hired to procure and supervise field workers to chop cotton, who was illiterate with only two years of schooling, who kept his "records" of the number of field workers and the number of hours they worked on parts of paper sacks which he brought to farm owner's bank, who was not paid enough to pay the field workers minimum wage and who was registered as a farm labor contractor, was an employee of farm owner for purposes of Fair Labor Standards Act and therefore field workers were also employees of farm owner for purposes of the Act. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

3. Labor Relations [Key]1124

In determining an individual's status as "employee" within meaning of Fair Labor Standards Act, a defendant's intent or the label that he attaches to the relationship is meaningless unless it mirrors the economic realities of the relationship. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

4. Labor Relations [Key]1479

Standard for willfulness, for purposes of section of Portal-to-Portal Act providing a three-year statute of limitations for willful violations of Fair Labor Standards Act, requires that employer have nothing more than awareness of the possible applicability of the Act; if an employer merely suspects that

his actions might violate the Act, the violation is willful. Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

5. Labor Relations [Key]1479

Violations of Fair Labor Standards Act by farm owner, who had been in banking business for 55 years and who knew of existence of minimum wage law and paid minimum wage to his bank employees, were willful within meaning of three-year statute of limitations for willful violations of the Act. Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

6. Labor Relations [Key]1124, 1301

An employer cannot escape record-keeping provisions of Fair Labor Standards Act by delegating that duty to his employees; furthermore, an employee must decide at his peril which employees are covered by the Act. Fair Labor Standards Act of 1933, § 11(c), 29 U.S.C.A. § 211(c).

7. Labor Relations [Key]1567

In suit charging violations of Fair Labor Standards Act, district court committed plain error in failing to specify burden of proof with regard to determination of number of hours worked by each employee. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

8. Licenses [Key]11(5)

Person who farm owner hired to procure and supervise field workers to chop cotton worked "for a fee" within meaning of Farm Labor Contractor Registration Act and was therefore a farm labor contractor within meaning of the statute. Farm Labor Contractor Registration Act of 1963, § 3(b), as amended, 7 U.S.C. (1976 Ed.), § 2042(b).

9. Labor Relations [Key]1645

Farm owner violated Farm Labor Contractor Registration Act by not maintaining payroll records on his field workers and those violations were intentional within meaning of Act. Farm Labor Contractor Registration Act of 1963, § 2 et seq., as amended, 7 U.S.C. (1976 Ed.) § 2041 et seq.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, JOHNSON and HIGGINBOTHAM, Circuit Judges.

JOHNSON, Circuit Judge:

Plaintiffs, thirty-nine Mexican and Mexican-American migrant farm laborers who chopped cotton in defendant's fields during the summers of 1977 and 1978, brought this action under section 216(b) of the Fair Labor Standards Act (FLSA) for unpaid minimum wages and liquidated damages and under section 2050a of the Farm Labor Contractor Registration Act (FLCRA) for liquidated damages. The district court entered judgment for defendant on both claims, based on the jury's answers to nine special issues. Plaintiffs appeal from the court's denial of their motions for judgment n.o.v. and alternatively for a new trial. With regard to the FLSA claim, this Court reverses and remands for a new trial on the number of hours worked by the individual plaintiffs and for a finding by the Court as to an award of liquidated damages.[1] With regard to the FLCRA claim, this Court reverses and

[1]The district court has discretion in whether to award liquidated damages and, if it does, in the amount of the award if the court determines that the defendant's failure to pay minimum wage was in good faith and that he had reasonable grounds to believe that his failure to pay minimum wage was not a violation of the FLSA:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liq-

remands for a determination of the number of violations committed and the award of liquidated damages in an amount of up to $500 per violation.

I *Facts*

Defendant Ercell Givens, President of the First State Bank of Abernathy for twenty-six years, owned a farm of approximately 4000 acres, of which about 1800 acres in 1977 and 2000

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uidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 260 (1975).

This Court has interpreted the statutory languages as follows:

Section 11 of the Portal-to-Portal Act [29 U.S.C. § 260], imposes upon an employer seeking to escape liquidated damages the plain and substantial burden of proving that its violation was "both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict."

Reeves v. International Telephone & Telegraph Corp., 616 F.2d 1342, 1352 (5th Cir. 1980) [citing *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468 (5th Cir. 1979)]. In discussing the "reasonable good faith" requirement, this Court made the following statements:

[W]e also doubt the validity of ignorance as a defense to liability for liquidated damages under Section 11. We do not believe an employer may rely on ignorance alone as reasonable grounds for believing that its actions were not in violation of the Act. Further, we feel that good faith requires some duty to investigate potential liability under the FLSA. Even inexperienced businessmen cannot claim good faith when they blindly operate a business without making any investigation as to their responsibilities under the labor laws. Apathetic ignorance is never the basis of a reasonable belief.

Barcellona, 597 F.2d at 468-69.

A successful showing by defendant under 29 U.S.C. § 260 does not preclude the award of liquidated damages. Under the language of the statute, even if the court determines that defendant has met the "reasonable good faith" requirement, the court nonetheless has discretion to award liquidated damages.

acres in 1978 were devoted to cotton production. Defendant employed five fulltime "hands" to run his farm as well as seasonal temporary hands to perform jobs such as operating tractors and feeding cattle. Defendant himself made the decisions of when and where to prepare the fields, when to plough, when to plant, when to cultivate, and when to harvest. In order to produce a good cotton crop, cotton should be chopped in the summertime[2] — the job simply involves chopping or hoeing the weeds out of the rows of growing cotton. It is a menial, unskilled task which requires no aptitude, no training, and no ability to reason. It is a work of drudgery which can be performed by persons ranging from very young to quite old; it is accomplished with a simple instrument — the hoe. Defendant employed Manuel Tonche to furnish him with a crew of field workers and to chop his cotton.[3] Defendant knew that Tonche was registered with the Department of Labor (DOL) as a farm labor contractor, and defendant required Tonche to show him his identification card from the DOL at the beginning of each season. Tonche, an illiterate with only a second-grade education who "junked" cars (cut up the bodies and sold the metal as scrap iron) in the winter, worked only for the defendant. In search of field work, the workers contacted Tonche. Tonche provided transportation to the fields for most of the workers in his used school bus, but some came in their own vans or pickups. Tonche's son brought the hoes to the fields in his pickup.

Tonche provided defendant with workers to chop his cotton for four years ending in 1978.[4] The crew varied in size, ranging

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[2]The cotton chopping season in the area involved runs from around June 20 to mid-August.

[3]Although defendant claims that he "contracted with" Tonche only to chop his cotton—not to furnish him with cotton choppers—defendant admitted at trial that Tonche could not chop the cotton on a 2000-acre farm all by himself.

[4]Plaintiffs ask for unpaid minimum wages for the years 1977 and 1978.

from around thirty or forty up to fifty persons on any one day. In addition to Tonche's crew, defendant also hired the wives, children, and friends of his fulltime hands to chop cotton. Although defendant always paid his bank employees minimum wage, he paid his cotton choppers, including Tonche, $1.65 an hour in 1977 and $1.75 an hour in 1978. The minimum wage was $2.20 an hour in 1977 and $2.65 an hour in 1978. Although defendant was aware of the minimum wage law and the amount of the minimum wage in 1977 and 1978, he stated that he did not realize that the law required him to pay minimum wage to his farm workers as well as to his bank employees.

On each Friday, defendant would give Tonche a check based on the number of hands and the number of hours Tonche reported to him had been worked. Tonche would then mete out the wages to the individual workers in cash. Tonche kept track of the number of hands and the number of hours worked on a daily basis and brought these figures to defendant on a piece of a paper sack.[5] Defendant would then copy Tonche's figures into his own record book. Significantly, defendant did not keep any further records other than his cancelled paychecks to Tonche. In particular, defendant did not keep any records of the individual plaintiffs' names, their hours of work, or their wages.

Both the exigencies of running a farm and his serving as bank president prevented defendant from physically supervising the work of his farm employees at all times. Nevertheless, defendant went to the fields three or four times a week to make sure the workers were in the right fields (his fields), to check up on the number of hands working, and to make sure how his entire farming operation was progressing. It was

[5]Tonche, with the help of his own children, kept a notebook of the individual workers' names (many were listed by nickname) and the number of hours they worked. The names and figures were often but not always transcribed into this notebook from loose pieces of paper where Tonche, his son, or daughter had written them while in the fields.

defendant who made the decision on when to start chopping in the season, on which fields to chop, and in what order the fields were to be chopped. Moreover, defendant directed Tonche which weeds were to be chopped and which weeds were not to be chopped; defendant determined when a job was finished.

In September 1978, the DOL investigated defendant's farming operation and determined that defendant owed back FLSA minimum wages to nine members of Tonche's crew who chopped cotton in defendant's fields in 1977 and 1978; defendant paid those nine workers. The DOL also investigated defendant for violations of the FLCRA; defendant was advised by letter in March 1979 that the DOL was not contemplating any further action on the violations indicated. In addition to Tonche, the plaintiffs who filed the instant action on February 14, 1980,[6] were members of Tonche's crew who did not receive back minimum wages.[7]

The case was tried to a jury. At the close of all the evidence, plaintiffs moved for a directed verdict on all issues except the calculation of the number of hours of work performed by plaintiffs. The jury found against plaintiffs on each of nine special issues submitted to it.[8] On June 19, 1981, the court entered

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[6]These plaintiffs include those who were later added by filing a written consent.

[7]Tonche, who was not a plaintiff under the FLCRA claim, died at the age of fifty-six before the trial began on June 15, 1981. Tonche's wife was substituted as his representative.

[8]In response to the special issues relating to the FLSA claim, the jury found that (1) plaintiffs were not engaged in the production of goods for commerce, (2) plaintiffs were not employees of defendant, and (3) defendant's failure to pay the minimum wage was not willful in 1977 or in 1978. Special Issues 4 and 5 related to the number of hours the individual plaintiffs worked in 1977 and 1978. On the FLCRA claim the jury found that (1) plaintiffs were not migrant workers; (2) Tonche was not a farm labor contractor; (3) defendant did not fail to maintain payroll records of the individual plaintiffs showing all of the following information: total earnings in each payroll period, all withholdings from wages, net earnings, number of

judgment for defendant on both claims. Plaintiffs moved for judgment n.o.v. with respect to all issues and alternatively for a new trial with regard to the hours they worked. In an order of October 7, 1981, the court denied both the motion for judgment n.o.v. and the motion for a new trial. With respect to the FLSA claim, the court concluded that the jury's finding that plaintiffs were not engaged in the production of goods for commerce was not supported by the evidence. The court stated, however, that the jury could have reasonably found that defendant was not plaintiffs' employer. With respect to the FLCRA claim, the court held that the jury's finding that plaintiffs were not migrant laborers was not supported by the evidence. Nevertheless, the court stated that the jury could have reasonably found that Tonche was not a farm labor contractor. Plaintiffs appeal from this order.

II. *FLSA Claim*

The issues this Court must address concerning the FLSA claim relate to the status of plaintiffs vis-a-vis defendant, the willfulness of any violation of section 16(b), and the number of hours plaintiffs worked.

A. *Plaintiffs' Status*

1. *A Question of Law*

[1] This Court has repeatedly held that the ultimate conclusion that an individual is an "employee" within the meaning of the FLSA is a legal determination rather than a factual

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units of time employed, rate per unit of time, a statement of all sums paid to Tonche on account of the labor of the worker, a statement of all sums withheld by Tonche from the amount he received on account of the worker, and the purpose of the above withholding; (4) any failure of defendant to comply with the FLCRA was not willful.

one.[9] Most recently, in *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662 at 666 (5th Cir. 1983), this Court dealt directly with the standard of review for the determination of employee status:

> We review the district court's determination [that the plaintiff welders are employees within the meaning of the FLSA] as being one of mixed law and fact. (citation omitted). As to the trial court's underlying factual findings and factual inferences deduced therefrom, we are bound by the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. *Id.* However, as to the legal conclusion reached by the district court based upon this factual data, *i.e.*, here that these welders are employees rather than independent contractors, we may review this as an issue of law.

Prior to *Robicheaux*, this Court had occasion to address the standard of review for the "employee" status determination in *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982). There, this Court stated:

> The standard of review of the district court's decision is that of a legal, and not a factual, determination. Thus, although we are bound by the clearly erroneous standard in reviewing the individual findings of fact leading to the district court's conclusions, we review the determination that the students here were not employees as we review any determination of law.

(citations omitted). The *American Airlines* holding is in accord with this Court's opinion in *Donovan v. Tehco*, 642 F.2d 141, 143 n. 4 (5th Cir. 1981) where we stated:

> In reviewing the district court's ultimate findings that the workers at issue were independent contractors, we

[9] Any subsidiary factual issues leading to this conclusion are, of course, questions of fact for the jury.

> are not constrained by the "clearly erroneous" standard. Rather, these ultimate findings are treated as legal determinations.

Donovan v. Tehco, Inc., 642 F.2d 141, 143 n. 4 (5th Cir. 1981). Prior to the *Tehco* decision, this Court in *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1189 n. 11 (5th Cir. 1979), had stated:

> In reviewing the Trial Court's ultimate finding that Weisel was not an employee, we are not constrained by the "clearly erroneous" test. Rather, that finding is treated as a legal determination. (citation omitted). However, the individual findings of fact leading to that conclusion are examined under the "clearly erroneous" test. *See Mitchell v. Strickland Transportation Co.*, 228 F.2d 124, 126 (5th Cir. 1955).

The initial decision of this Circuit holding that the employee/independent contractor status determination is a legal one was *Shultz v. Hinojoso*, 432 F.2d 259 (5th Cir. 1970). In *Shultz*, this Court stated:

> There is no dispute as to the basic facts relating to the engagement of Jiminez for the performance of the cleanup work after he finished his day's work as a slaughterer. The trial court's determination that these facts created the relationship of an independent contractor . . . is not a finding of fact which is bolstered by the clearly erroneous rule when reviewed by this court. In the early case of *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772, the Supreme Court as well as the Court of Appeals for the Tenth Circuit, *Walling v. Rutherford Food Corp.*, 156 F.2d 513 [10th Cir.], treated such a finding as being subject to review as a matter of law, notwithstanding an elaborate disagreement on this point by Judge Phillips in the Court of Appeals. *See* 156 F.2d 513 at page 517. It is clear that the definition of

> employment, as used in the Fair Labor Standards Act, is "the broadest definition that has ever been included in one act."

Id. at 264.[10]

Although the above-mentioned cases were tried to the Court rather than to a jury, there is no basis to differentiate between a jury and a nonjury case regarding the status of an employee determination as legal or factual. The substantive provisions of the Act at issue — violations of minimum wage, overtime, and record keeping provisions — are the same in both jury and nonjury cases. If the employee/independent contractor determination is a legal one in a case tried to the court, it must also be a legal one in a case tried to a jury. Indeed, *Robicheaux*, although tried to the court, was a section 216(b) suit in which the plaintiff-welders were entitled to a jury trial.[11] A plaintiff's decision to exercise his right to a jury

[10]The Eleventh Circuit has also held that the issue of employee status is a legal one which is not subject to the clearly erroneous standard of review, but that the individual findings of fact which lead to that legal determination must be examined under the clearly erroneous standard. *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471 n. 4 (11th Cir. 1982).

[11] The FLSA establishes three separate statutory causes of action: (1) under Section 16(b), 29 U.S.C. § 216(b), an employee may sue his employer for unpaid overtime compensation, unpaid minimum wages, and an additional equal amount in liquidated damages; (2) under Section 16(c) the Secretary may sue on behalf of an employee or employees to recover unpaid overtime, unpaid minimum wages, and an additional equal amount as liquidated damages; and (3) under Section 17 the Secretary may seek to enjoin violations of the FLSA and to restrain the withholding of payment of minimum wages and overtime compensation which are due employees under the Act.

* * * * * *

Actions brought under Section 16(c) by the Secretary or under Section 16(b) by an employee have been consistently recognized as analogous to actions at law. A party in those actions has the right to a jury

trial does not change the standard of review to be applied by this Court.[12]

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trial. *Lewis v. Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950); 5 Moore's Federal Practice ¶38.27, p. 213-14. Section 11 of the Portal-to-Portal Act provides, however, that the issue of liquidated damages is triable to the court. *McClanahan v. Mathews*, 440 F.2d 320 (6th Cir. 1971). *Marshall v. Hanioti Hotel Corp.*, 490 F.Supp. 1020, 1022 & 1023 (N.D.Ga. 1980) (footnote omitted).

[12]Although the substantial line of authority in this Circuit has held that the question of employee determination is a legal one, it must be noted that there is contrary authority within the Circuit. In the recent case of *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194 (5th Cir. 1983), this Court stated:

> [1] An "employer" is defined under Section 3(d) of the Act as including "any person acting directly in the interest of an employer in relation to an employee." This term has been interpreted to encompass one or more joint employers, *Falk v. Brennan*, 414 U.S. 190, 94 S.Ct. 427, 38 L.Ed.2d 406 (1973); *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.), cert. denied, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968), 29 C.F.R. § 791.2 (1982). Whether a party is an employer or joint employer for purposes of the FLSA [sic] is essentially a question of fact; accordingly, appellate review is subject to the clearly erroneous standard.

The two cases cited by this Court in *Sabine* stated that "[w]hether a person or corporation is an employer or joint employer is essentially a question of fact" and therefore subject to review under the "clearly erroneous" standard. *Griffin and Brand*, 471 F.2d at 237-38 (citing *Lone Star Steel*); *Lone Star Steel*, 405 F.2d at 669-70 [citing *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964)]. Two points need to be made. First, the *Sabine*, *Griffin and Brand*, and *Lone Star Steel* opinions all use the less-than-precise terminology "essentially a question of fact." At least in *Lone Star Steel*, this terminology was probably totally consistent with the line of cases in this Circuit holding that the ultimate determination of employee status is a question of law. The trial court's "findings of fact," held to be not clearly erroneous, were attached to the Court's opinion in *Lone Star Steel* as an appendix. All of these findings of fact were individual or underlying findings from which the Court could draw its legal conclusion as to employee status. In *Griffin and Brand*, where this Court reviewed the district court's conclusion that defendant was a joint employer under the clearly erroneous standard, the Court may have been misled by the imprecise "essentially a question of fact" language in *Lone Star Steel*. The determination is "essentially a question of fact" only if

Given the record testimony in the instant case, there are no unresolved issues of fact which would alter this Court's conclusion that plaintiffs were employees of defendant. The sole

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there are unresolved, underlying factual questions. The application of the rule of law regarding employee status to the underlying facts remains a conclusion of law.

Secondly, the *Lone Star Steel* opinion relied upon the Supreme Court's opinion in *Greyhound*, 84 S.Ct. at 899; the *Griffin and Brand* opinion also cited *Greyhound*. The Supreme Court in that case, however, did not state that the determination whether a person is an employer (and that plaintiffs therefore are employees) is essentially a question of fact. What the Supreme Court stated was that the question "whether *Greyhound* possessed sufficient *indicia of control* to be an 'employer' is essentially a factual issue." *Id.* (emphasis added). Findings regarding indications of control would, of course, be findings of fact. Most importantly, however, the Supreme Court's statement must be read in context. *Greyhound* involved the circumstances under which a district court can undertake a plenary review of orders of the National Labor Relations Board (Board) in certification proceedings. The Court in *Greyhound* was making a contrast between *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), upon which the district court in *Greyhound* had predicated its jurisdiction, and the factual situation in *Greyhound*. The district court in *Greyhound* had held that the Board's findings in the certification proceeding were insufficient as a matter of law to establish a joint employer relationship and that those findings established, as a matter of law, that Floors, Inc. was the sole employer of the employees in question; the court held that the Board had violated the National Labor Relations Act (NLRA) by attempting to conduct a representation election where no employment relationship existed. The Court of Appeals had affirmed. The Supreme Court reversed, stating that the case did not fall within the narrow and extraordinary limits of the *Kyne* exception which allows district court review of orders entered in certification proceedings. In *Kyne*, the Board conceded that it had acted in excess of its delegated powers, and the Board's order was contrary to a specific prohibition in the NLRA. The Court in *Greyhound* stated:

> And whether Greyhound possessed sufficient indicia of control to be an "employer" is essentially a factual issue, unlike the question in *Kyne*, which depended solely upon construction of the statute. The Kyne exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the

question is whether the facts satisfy the statutory standard for an "employee" under the FLSA. Since employee status was established as a matter of law, the district court erred in submitting it to the jury.

2. *Employee Status*

[2] In order to resolve the question whether plaintiffs were employees of defendant, this Court will examine the relationship between Tonche and defendant. If Tonche was an employee of defendant, the plaintiff field workers were also defendant's employees. Even in the event that Tonche were an independent contractor, this Court could conclude that Tonche was a joint employer with the defendant; in this instance, the field workers would still be employees of the defendant. *Hodgson v. Griffin & Brand*, 471 F.2d 235, 237 (5th Cir.), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973). In this hypothetical situation, the Court could, of course, conclude that Tonche was not a joint employer with the defendant. Since this Court concludes that Tonche was an

courts of appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.

Greyhound, 84 S.Ct. at 899.

Furthermore, Greyhound had argued that the Board had acted in excess of its statutory powers when it found that Greyhound was an employer of employees who were hired, paid, transferred, and promoted by an independent contractor (Floors). In rejecting Greyhound's argument, the Supreme Court attempted to clarify that Greyhound's possible employer status was unaffected by any determination as to the status of Floors as an independent contractor, *i.e.*, a finding that Floors was an independent contractor did not preclude the existence of factual questions concerning Greyhound's status as an employer. The Court's point was that underlying factual issues regarding Greyhound's status as an employer could still remain despite a determination that Floors was an independent contractor — independent contractor status does not necessarily mean that the contractor is the sole person responsible for his employees under the Act. Placed in context, the "essentially a factual issue" statement in *Greyhound* does not undermine this Circuit's decision to review the ultimate conclusion as to employer status under the FLSA as a question of law.

employee of defendant, we do not examine the possibility of a joint employer status.

[3] Defendant maintains that he hired Tonche as an independent contractor to chop his cotton[13] and that plaintiff field workers were therefore employees of Tonche. In determining an individual's status as "employee" within the meaning of the FLSA, however, defendant's intent or the label that he attaches to the relationship is meaningless unless it mirrors the "economic realities" of the relationship. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 1476, 91 L.Ed. 1772 (1947); *Donovan v. Tehco*, 642 F.2d at 143; *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1315 (5th Cir.), *cert. denied*, 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed.2d 89 (1976); *Mitchell v. Strickland Transportation Co.*, 228 F.2d 124, 126 (5th Cir. 1955). Employee/independent contractor status under federal social welfare legislation is determined in light of the purposes of the legislation:[14] "[E]mployees are those who as a matter of economic reality are dependent upon the

[13]Defendant argues that he contracted with Tonche to chop his cotton — not to furnish him with cotton choppers. This verbal distinction represents nothing more than an attempt at label attachment; the distinction is significant only insofar as it mirrors the economic reality of the relationship. *See Donovan v. Tehco*, 642 F.2d at 143. Not surprisingly, defendant admitted at trial that he expected Tonche to get the cotton chopped and that Tonche could not do the chopping all by himself, that he had to get others to chop.

[14]The Supreme Court in *Rutherford*, 331 U.S. at 727, 67 S.Ct. at 1475 explained the purpose of the FLSA:

> The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers. It was sought to accomplish this purpose by the minimum pay and maximum hour provisions and the requirement that records of employees' services be kept by the employer.

business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547, 1550, 91 L.Ed. 1947 (1947).[15] As this Court noted in *Fahs v. Tree-Gold Co-Op Growers*, 166 F.2d 40, 44 (5th Cir. 1948):

> Under these decisions, the act is intended to protect those whose livelihood is dependent upon finding employment in the business of others. It is directed toward those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings. The statutory coverage is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service.

Although defendant acknowledges that the common-law control test is not conclusive, defendant argues that the common-law control factors are material in defining an individual's status for purposes of the FLSA. Defendant places great weight on various specific control elements—defendant did not decide how many or which workers to hire and fire,[16]

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[15]The critical decisions interpreting the term "employee" in federal social welfare legislation are as follows: *NLRB v. Hearst*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944) (for purposes of the National Labor Relations Act); *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), and *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947) (for purposes of employment taxes on employers under the Social Security Act, as amended); and *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947) (for purposes of the Fair Labor Standards Act).

[16]Defendant conceded at trial that he had the authority to fire a crew of workers.

did not supervise the details of their work,[17] did not furnish the hoes, did not provide transportation, did not decide when the workers arrived at the fields and when they quit, and, defendant argues, did not determine their rate of pay.[18]

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[17]Although defendant did not supervise the minor, regular tasks, the record demonstrates that he did exercise control over the significant aspects of the farming operations. Defendant showed Tonche where the fields were located; defendant determined which fields would be hoed and in what order; he gave instructions regarding which weeds to chop and which to leave in the ground; he determined when the workers had finished a job. Defendant went to the fields three to four times a week to check up on Tonche and the workers. He would make sure that they were in the right fields and he would often doublecheck Tonche's count of the number of workers in the fields on a particular day. Defendant admitted that it is the nature of the farming business that the farmer has to depend on his workers — the farmer cannot be in the fields supervising at all times.

[18]Defendant argued at trial that Tonches set the workers' wages. Defendant testified that he asked Tonche how he wanted to "figure it" and Tonche replied he would figure $1.65 an hour (in 1977). Defendant also testified that he had no agreement with Tonche as to how much Tonche would pay the workers and that defendant had no idea how much Tonche did in fact pay them. Defendant also testified, however, as follows: "We [the farmers in the community] paid them the same amount all over the place for hoeing. All community-wide, it was the same. . . . I know what they [the farmers who were customers of defendant's bank] do. I know what they pay. They ask me what I am paying, and we are all the same." In addition, defendant testified that he gave money to Tonche for each day according to the number of hands he had listed as working on that day and the number of hours they worked. That is, defendant multiplied the number of workers times the number of hours worked times $1.65 an hour and on Fridays gave Tonche one check for the total number of hours worked. Moreover, defendant testified as follows:

Q. You also hired friends of the wives of your full-time hands to hoe cotton, didn't you?

A. Sometimes they would have a girl with them.

Q. And you paid them $1.65 in 1977?

A. I paid them the same.

Q. And you paid them $1.75 in 1978?

A. Right.

Q. In fact, you paid all your cotton hoers $1.65 in '77 and $1.75 in '78, isn't that true?

A. That's true.

By focusing on selected and isolated control factors, however, defendant loses sight of the circumstances of the whole activity. *See Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477. This Court has on several occasions found employment status even though the defendant-employer had no control over certain aspects of the relationship, *e.g.*, the right to set hours, hire and fire, or determine wages. *Usery*, 527 F.2d at 1312 (finding that "[i]n the total context of the relationship neither the right to hire employees nor the right to set hours" indicated such lack of control by [defendant] as would show that the laundry operators were independent contractors); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 301 (5th Cir. 1975) (stating that "the courts have had little difficulty in finding employment status though the employee could hire others within his own discretion"); *Fahs*, 166 F.2d at 43 (concluding that contractors at defendant's packing house were employees of defendant even though defendant had no right to control the number of employees, their wages or the hours they worked). As this Court stated in *Mednick*, 508 F.2d at 300, the "ultimate criteria" for the determination of employee status are found in the purposes of the Act. The presence of some indications of independent contractor status, however, must not obscure the focal inquiry — is the individual whose status is in question the "kind of *person*" meant to be protected by the FLSA? *Id.* at 301.

Q. I believe, though, in your deposition you said that there was one person you felt sorry for a little bit and you had given her $2.00 an hour?
A. Well, there may be.
Q. Do you recall that?
A. I won't doubt but what that is true. I think that's right. I think I have. I don't remember it offhand, who it was. But may have a special daughter-in-law or son-in-law or something that you give $2.00 to. I don't know. I don't know. I paid $2.00 maybe to somebody.

Assuming, *Arguendo*, the existence of an issue of fact concerning who set the workers' wages, this Court would still come to the same legal conclusion even if the jury resolved the issue in favor of defendant.

The presence of certain elements of control is not necessarily determinative. Whether Tonche was exposed "to the evils the statute [FLSA] was designed to eradicate," *see id.* at 300, hinges upon whether he was dependent upon defendant's farming operation. Indeed, "[t]he touchstone of 'economic reality' in analyzing a possible employee/employer relationship for purposes of the FLSA is dependency." *Weisel*, 602 F.2d at 1189. The determinative question is whether the person is "dependent upon finding employment in the business of others." *Fahs*, 166 F.2d at 44. Two factors have emerged as critically significant in answering this question: (1) how specialized the nature of the work is, and (2) whether the individual is "in business for himself."[19] *Mitchell v. John R. Cowley & Brothers, Inc.*, 292 F.2d 105, 108 (5th Cir. 1961). The first factor looks to whether the individual "regularly performs tasks essentially of a routine nature and that work is a phase of the normal operations of that particular business." If so, the Act ordinarily regards him as an employee. *Id.* The record unquestionably demonstrates the rote nature of Tonche's work. Cotton chopping involves one piece of equipment and one task: taking a hoe and chopping the weeds out of cotton. It is such a simple task that even children can do it — it requires

[19] *Rutherford*, 67 S.Ct. at 1477 and its companion case, *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 1469, 91 L.Ed. 1757 (1947) (dealing with the meaning of employee for purposes of social security taxes), set out criteria for distinguishing employees from independent contractors. The *Rutherford* criteria are as follows:

(1) The workers did a specialty job on a production line.

(2) The contractual terms did not vary in any material way as one worker succeeded another.

(3) The premises and equipment were those of the proprietor.

(4) The workers had no "business organization" that could offer their services to others.

(5) The proprietor's manager kept close watch over the workers' activities.

(6) The workers could profit from "efficiency," but it was the efficiency of the pieceworker, not that of an "enterprise that actually depended for

no aptitude, no training, no skill, and no experience. Moreover, the evidence demonstrates that cotton chopping was merely a phase of the normal operation of defendant's cotton farming business. Cotton chopping constituted a part of an "integrated eocnomic unit" devoted to the growing of cotton. *See Rutherford*, 67 S.Ct. at 1475 & 1476; *Shultz*, 432 F.2d at 264; *Fahs*, 166 F.2d at 44. Chopping the cotton made it grow and produce better, and made it easier to harvest. Chopping the cotton was an integral phase of defendant's entire farming operations. Although the chopping season only runs from mid-June to mid-August, the work is recurring and of relative permanence — it has to be done every year during the growing season in order to harvest a good cotton crop. In addition to chopping cotton,[20] Tonche supervised the workers in the field, provided transportation for some, kept what records there were of the number of workers and their hours, received a check from defendant every Friday, and meted out the earnings to the individual workers. All of these tasks were routine. The first inquiry, therefore, points strongly to employee status for Tonche and therefore for the field workers.

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success upon the initiative, judgment or foresight of the typical independent contractor."

Mednick, 508 F.2d at 300 (*citing Rutherford*). The *Silk* criteria are as follows: "(1) the permanency of the working relationship, (2) the opportunity for profit and loss, (3) investment in material, (4) the degree of control, and (5) the individual's skill." *Donovan v. Tehco*, 642 F.2d at 143 (*citing Silk*). Obviously, some of these 11 criteria overlap and some might not be relevant depending upon the particular case. This Court has stated that it is not possible to assign each of these factors a specific weight and that it is not necessary that evidence exist with respect to each factor in order to determine whether an employment relationship exists. *Hickey v. Arkla Industries, Inc.*, 688 F.2d 1009, 1012 (5th Cir. 1982). The cases tend to crystallize the criteria into the two basic inquiries listed above. Indeed, this Court in *Mednick*, 508 F.2d at 300, cautioned against placing too much emphasis on the *Rutherford* and *Silk* criteria, thereby losing sight of the ultimate criteria (the dependency question).

[20] *See*, note 3, *supra*.

The second factor is the "focal inquiry in the characterization process": "whether the individual is or is not, as a matter of economic fact, in business for himself." *Donovan v. Tehco*, 642 F.2d at 143. The record here does not indicate that Tonche had anything that could be called an independent business as distinguished from personal labor.[21] Tonche was an illiterate with only two years of schooling. He could not read or write in either Spanish or English; he only knew how to write his name and numbers and how to figure. He kept his "records" of the number of field workers and the number of hours they worked on parts of paper sacks which he brought to defendant's bank. Some of these "records" were later transcribed into Tonche's record book by Tonche's son or daughter. The workers were often listed in Tonche's book by nicknames or by families. Tonche had "no experience or qualifications to distinguish him

[21]This Court in *Donovan v. Tehco*, 642 F.2d at 144, held that, given the exceptionally broad definition of employee in the FLSA, evidence introduced by the Secretary of Labor that the individuals in question were on the defendant-employer's payroll was sufficient to shift the burden of producing evidence to defendant. (The evidence consisted of wage transcriptions based on defendant's payroll records showing the number of hours each individual worked for defendant and his rate of pay.) This Court concluded that since defendant introduced little or no evidence to show that the individuals on its payroll were "in fact in business for themselves," the district court should have found that the Government had established the employee status of these individuals by the necessary preponderance of the evidence. In the instant case, plaintiffs introduced the checks that were given by defendant to Tonche in 1977 and 1978 as well as defendant's notebook in which defendant had recorded on a daily basis the information imparted to him by Tonche—the number of hands and the number of hours they worked. This evidence was sufficient to shift the burden of producing evidence that Tonche was in fact in business for himself to defendant. Defendant totally failed to carry this burden with regard to the issue before the Court—whether Tonche, as an independent businessman, was engaged in the business of offering crews of workers to defendant *and other growers*. (emphasis added). Assuming, *arguendo*, the relevance of the fact that Tonche junked cars in the winter, defendant likewise wholly failed to carry his burden of producing evidence that Tonche was not dependent on defendant's farming operation for his livelihood.

from the general run of workers." *See Mednick*, 508 F.2d at 303. Although Tonche did exercise some control over the field workers, there was no "economic substance" behind his power. *See id.* at 302. The fact that Tonche supervised minor, routine tasks cannot be "bootstrapped into an appearance of real independence." *See Usery*, 527 F.2d at 1312. Neither minor record keeping nor rote work, even if the work requires industriousness, is indicative of independence and nonemployee status. *Id.* at 1314. Any decisions involving judgment, initiative, or basic control were made by defendant, not Tonche. Tonche did not exert control over any meaningful part of defendant's business such that Tonche's "part" stood as a separate economic entity. *See id.* at 1312-13. Given the rate of pay and method of payment (by the hour) there was no real opportunity for Tonche to make any profit or loss. Except for the one simple and virtually indestructible instrument utilized — the hoe — all investment or risk capital was provided by defendant. Tonche's investment in hoes was "minimal in comparison with the total investment in land, heavy machinery and supplies necessary for growing" cotton. *See Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 755 (9th Cir. 1979). Tonche's relationship with defendant was of limited duration but of a permanent nature, recurring every year.[22] Significantly, Tonche did not work or provide workers for any grower other than defendant. The record here does not supply any indicia whatsoever of a business operated by Tonche whereby he offered crews of workers to other growers. Indeed, Tonche did not recruit the workers as an independent businessman would. Instead, the workers, who were Hispanic, called Tonche from South Texas to inquire about work. Tonche did not operate with recognizable or consistent crews in that the hands varied in number from day-to-day. In short, Tonche had little to transfer but his own labor. *See id.* at 1314.

[22]The work done by the packing house contractors (determined to be employees) in *Fahs*, 166 F.2d at 45, was also seasonal.

Of particular importance is the fact that defendant did not pay Tonche enough for Tonche himself to pay the workers minimum wage; it was therefore impossible for Tonche to comply with the FLSA. *See Mitchell*, 292 F.2d at 109. Tonche, as an economic entity, was not capable of doing business elsewhere. *See Usery*, 527 F.2d at 1315. The economic reality of the situation was that the workers were dependent upon defendant — not Tonche — to pay them the minimum wage. They were dependent upon defendant's cotton growing business — not any "business" of Tonche's.[23] As this Court stated in *Mednick*, 508 F.2d at 303:

> An employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties under the F.L.S.A., by granting him some legal powers where the economic reality is that the worker is not and never has been independently in the business which the employer would have him operate.

This approximately fifty-four year old illiterate cotton chopper cannot be said to be an independent businessman in any meaningful sense.

One last point is in order. Defendant cannot rely on Tonche's registration as a "farm labor contractor" to establish independent contractor status for Tonche for purposes of the FLSA, thereby insulating himself from the FLSA requirements. As the Court in *Marshall v. Presidio Valley Farms, Inc.*, 512 F.Supp. 1195, 1197 (W.D. Tex. 1981), stated: "This interpretation would permit wholesale evasion of the requirements of the F.L.S.A. Nothing in the Farm Labor Contractors Act suggests that this court must apply that Act to the exclusion of the F.L.S.A." The answer to the question of employee sta-

[23]Of course, these facts also support the conclusion that the field workers were employees of defendant. Since this Court has concluded that Tonche was an employee of defendant, we do not separately discuss the relationship of the employees to defendant.

tus lies in the "economic realities" of the situation. In the case at hand, those economic realities allow only one conclusion: Tonche was an employee of defendant.

B. *Willfulness*

[4] Section 255(a)[24] of the Portal-to-Portal Act provides a three-year statute of limitations for willful violations of the FLSA.[25] The standard for willfulness was established by this Circuit in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972). This Court in *Jiffy June* stated that the test is whether the employer knew the FLSA was in the picture. *Id.* This standard requires that employers have nothing more than "awareness of the possible applicability of the FLSA." *Id.* If an employer merely suspects that his actions might violate the Act, the violation is willful. The Court explained the necessity for this standard as follows:

> The entire legislative history of the 1966 amendments of the FLSA indicates a liberalizing intention on the part of Congress. Requiring employers to have more than

[24]29 U.S.C. § 255(a) provides as follows:

§ *255. Statute of limitations*

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, . . . under the Fair Labor Standards Act of 1938, as amended, . . .

(a) if the cause of action accrues on or after May 14, 1947 — may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

[25]Plaintiffs in this case do not request recovery of unpaid wages for three years back. The significance of the willfulness issue relates to (1) whether plaintiffs' 1977 wage claims are barred (a two-year statute would bar any claims that accrued prior to February 14, 1978), and (2) whether plaintiff Reynaldo Arriolas' (added as a plaintiff in February 1981 by an amended complaint) 1978 wge claim is barred.

awareness of the possible applicability of the FLSA would be inconsistent with that intent.

Id.

[5] On appeal, defendant makes two arguments. First he contends that he had no reason to believe the FLSA was "in the picture" because he hired Tonche as an independent contractor and therefore assumed plaintiffs were employees of Tonche. This argument is without merit. It is little more than an attempt to exculpate himself by portraying Tonche in the guise of an independent contractor, by attaching a label to him. The *Jiffy June* standard mandates the rejection of defendant's argument: a violation committed in good faith can indeed be "willful." *Id.* at 1141.

Secondly, defendant argues that his violation was not willful because he had no knowledge that the FLSA was applicable. The *Jiffy June* standard does not require that defendant know that his actions are governed by the FLSA. It requires only that the employer have an "awareness of the possible applicability" of the Act. Indeed, this Court has unequivocably rejected the argument of "lack of knowledge" of the applicability of the FLSA: "An ostrich-like cultivation of ignorance has never been considered a defense to liability for willful violation of the Act." *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974).

This Court turns to the record in the instant case to determine whether defendant had reason to suspect the FLSA was "in the picture." Defendant testified that he had been in the banking business for fifty-five years. Defendant had held the position of President of the First State Bank in Abernathy for twenty-six years and owned stock in the bank. As president of the bank, defendant worked in that business five days a week; he was aware of the minimum wage law and what the minimum wage was in 1976, 1977, and 1978. Defendant admitted that he had always paid his bank employees minimum wage,

but protested that he did not know the minimum wage applied to his farm workers. Defendant used a particular law firm for legal advice, but testified that he had never even made inquiry of his attorneys whether his farm employees were covered by the minimum wage law.

Given this record testimony, defendant may not assume "an ostrichlike cultivation of ignorance" and urge it as a defense. Good faith ignorance will not shield a defendant from his obligation to make "further inquiries" and to "determine the exact parameters of his statutory obligation." *See id.* In *Jiffy June*, the defendant had even sought and secured legal advice that his employees were exempt from the FLSA. *Jiffy June*, 458 F.2d at 1141-42. Even so, his violation was held to be willful. Here, the fact that defendant knew of the existence of the minimum wage law and paid minimum wage to his bank employees compels a finding of willfulness under the *Jiffy June* standard.

C. *Number of Hours Worked*

[6] Defendant failed to keep records of the hours worked by the individual plaintiffs[26] as required by 29 U.S.C. § 211(c).[27] This section places on the employer the obligation of keeping accurate records of the hours worked by his employees; the employer cannot transfer his statutory duty to his

[26]The only records kept by defendant were his weekly paychecks to Tonche and a notebook which contained a tally of the hours worked each week (listing the number of hands and the number of hours worked) in 1978.

[27]29 U.S.C. § 211(c) provides as follows:

> (c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

employees. *Goldberg v. Cockrell*, 303 F.2d 811, 812 n. 1 (5th Cir. 1962).

Defendant argues on appeal that his failure to keep records was mitigated by the fact that Tonche kept records which were introduced into evidence. Tonche's records were clearly incomplete and insufficient to satisfy the record keeping provisions of the Act. Moreover, this Court in *Goldberg*, *id.*, stated that "while there is nothing to prevent an employer from delegating to his employees the duty of keeping a record of their hours, the employer does so at his peril. He cannot escape the record keeping provisions of the Act by delegating that duty to his employees." (*citing Mitchell v. Reynolds*, 125 F.Supp. 337, 340 (W.D. Ark. 1954)). Furthermore, an employer must decide at his peril which employees are covered by the Act. *George Lawley & Son Corp. v. South*, 140 F.2d 439 (1st Cir.), *cert. denied*, 322 U.S. 746, 64 S.Ct. 1156, 88 L.Ed. 1578 (1944).

In *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 1192, 90 L.Ed. 1515 (1946), the Supreme Court specified the burden of proof in cases where the employer has failed to maintain the records required by the FLSA:

> In such a situation, we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

A number of Fifth Circuit cases have applied this standard. *See, e.g., Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 419-20 (5th Cir. 1975); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973); *Shultz*, 432 F.2d at 261.

In formulating this standard, the Court was concerned that employees not be penalized by an employer's failure to comply with its statutory duty to maintain accurate records:

> When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of these records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act.

Anderson, 66 S.Ct. at 1192.

[7] In the instant case, plaintiffs met their burden of proof by demonstrating that they performed work and were not compensated in accordance with the statute. Thirteen plaintiffs testified regarding the hours they and members of their families worked. Plaintiffs' witness Walter Johnston, a Ph.D. candidate in statistics, calculated a minimum and maximum number of hours each plaintiff worked, basing his calculations on plaintiffs' testimony. Defendant calculated his payments to Tonche based on the rate of $1.65 per man hour in 1977 and $1.75 per man hour in 1978. The court took judicial notice of

the minimum wage in these two years: $2.20 an hour in 1977 and $2.65 an hour in 1978. At that point, the burden of proof shifted to defendant to prove the precise amount of work plaintiffs performed or to negative[28] the reasonableness of the inferences to be drawn from plaintiffs' evidence.[29]

The court, however, failed to properly place the burden of proof. The court's only instruction to the jury in this regard was that "it is the duty of an employer to keep and maintain accurate records of the number of hours that an employee works for said employer and it is not the duty of the employee to keep such records."

Plaintiffs did not object to the court's instruction. The burden of proof, however, is "always of major importance," *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1372 (5th Cir. 1969) and this Court is persuaded that proper placement of the burden of proof in this case could have made a substantial difference in the determination of the number of hours worked by each plaintiff. This Court therefore concludes that the district court's charge constituted plain error and reviews the instruction on appeal despite plaintiffs' failure to object at the trial level. Because the court failed to properly place the burden of proof, this Court reverses and remands for a new trial on the number of hours worked by plaintiffs.

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[28]Webster's defines "negative" as follows: "to demonstrate the falsity of: disprove" or "contradict." Webster's Third New International Dictionary (1976).

[29]In the instant case, defendant's efforts to impeach plaintiffs' testimony were minimal. Defendant attempted to show that the names of certain plaintiffs did not appear in Tonche's records and that Tonche's record books accounted for fewer hours than were paid for by defendant in his checks to Tonche. Plaintiffs' own testimony, however, had already established that Tonche's records were incomplete. Otherwise, testimony by defendant's fulltime hands (who planted, ploughed, and harvested) merely made general allegations that the field workers were lazy and misrepresented the number of hours they worked. This testimony did not identify any particular worker or workers.

C. *Conclusion*

This Court has concluded that Tonche was an employee of defendant and that therefore plaintiffs were defendant's employees, that defendant's failure to pay minimum wage was willful, and that the district court's erroneous instruction which failed to specify the burden of proof necessitates a new trial on the number of hours worked by the individual plaintiffs.

II. *The FLCRA Claim*

The issues this Court must address concerning the FLCRA claim involve the questions whether Tonche was a farm labor contractor and whether defendant's violation of the Act was intentional.

A. *The Fee Issue*

[8] The FLCRA requires that a farmer who uses a contractor (1) verify that the contractor is registered before hiring him[30] and (2) maintain wage and hour records of the individual members of the contractor's crew.[31] Defendant made

[30] 7 U.S.C. § 2043(c) provides as follows:

> (c) No person shall engage the services of any farm labor contractor to supply farm laborers unless he first determines that the farm labor contractor possesses a certificate from the Secretary that is in full force and effect at the time he contracts with the farm labor contractor.

[31] 7 U.S.C. § 2050c provides as follows:

§ 2050c. Recordkeeping

> Any person who is furnished any migrant worker by a farm labor contractor shall maintain all payroll records required to be kept by such person under Federal law, and with respect to migrant workers paid by a farm labor contractor such person shall also obtain from the contractor and maintain records containing the information required to be provided to him by the contractor under section 2045(e) of this title.

Section 2045(e) provides that "[e]very farm laborer contractor shall—

> (e) in the event he pays migrant workers engaged in interstate agricultural employment, either on his own behalf or on behalf of another person, keep payroll records which shall show for each worker total

certain that Tonche was registered as a farm labor contractor but made no effort to maintain the statutorily-required payroll records on plaintiffs. The jury's response to Special Issue 8 that defendant did not fail to obtain and maintain payroll records finds no support in the evidence.

The question on appeal is whether defendant used a farm labor contractor within the statutory definition of the term. The FLCRA defines a farm labor contractor as follows: "any person, who for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers (excluding members of his immediate family) at any one time in any calendar year for interstate agricultural employment." 7 U.S.C. § 2042(b). During the period when defendant dealt with Tonche, Tonche was registered with the DOL as a farm labor contractor pursuant to 7 U.S.C. § 2043(a). Defendant conceded that each year Tonche worked for him, he asked Tonche to show him Tonche's registration card[32] before Tonche first started working and before paying him.[33]

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earnings in each payroll period, all withholdings from wages, and net earnings. In addition, for workers employed on a time basis, the number of units of time employed and the rate per unit of time shall be recorded on the payroll records, and for workers employed on a piece rate basis, the number of units of work performed and the rate per unit shall be recorded on such records. In addition he shall provide to each migrant worker engaged in interstate agricultural employment with whom he deals in a capacity as a farm labor contractor a statement of all sums paid to him (including sums received on behalf of such migrant worker) on account of the labor of such migrant worker. He shall also provide each such worker with an itemized statement showing all sums withheld by him from the amount he received on account of the labor of such worker, and the purpose for which withheld. The Secretary may prescribe an appropriate form for recording such information.

[32]The fact that Tonche carried a farm labor contractor identification card does not confer independent contractor status upon him for purposes of the FLSA.

[33]Defendant testified as follows:

Q. When he showed you — he showed you his card, didn't he?

The only question in ascertaining Tonche's status is whether Tonche worked "for a fee" as required by section 2042(b).[34] The term "fee" as used in the Act "includes any money or other valuable consideration paid or promised to be paid to a person for services as a farm labor contractor." 7 U.S.C. § 2042(c). It is undisputed that Tonche received consideration for his services. The record evidence demonstrates that Tonche received $1.65 an hour for his services in 1977 and $1.75 an hour in 1978 — the same amount that defendant paid almost all of his hands. FLCRA regulations make clear that salary or wages

A. I asked him if he had a card to pay him with, and he said yes, and he showed me this card.
Q. Okay. And that happened in both 1977 and 1978?
A. Yes, happened every year that he worked for me.

* * * * * *

Q. And you wrote down the '78 registration number inside the cover of the book, isn't that correct?
A. Inside this?
Q. Yes. . . . Okay. And you did that when Mr. Tonche first started working for you in '78?
A. Well, that's when he started working, I asked him if he had his card, and he said, "Yes," and that's what we put down, was '78, because it was '78.
Q. Okay. You wrote the registration number down?
A. Yes, I put this down here.

[34]When the district court denied plaintiffs' motion for a judgment n.o.v., the court stated that "[r]easonable minds could have differed as to whether Tonche's compensation constituted a fee for recruiting and furnishing migrant workers or a payment for services he performed as an hourly paid laborer. The district court, however, erred in submitting the question of Tonche's status as a farm labor contractor to the jury. There was no unresolved issue of fact—it was undisputed that Tonche received consideration for his services. Whether this consideration constituted "a fee" within the statutory definition is a question of law. *See Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1220-21 (7th Cir. 1981) (treating the fee issue as a question of law); *Marshall v. Coastal Growers Ass'n*, 598 F.2d 521, 523-24 (9th Cir. 1979) (treating the fee issue as a question of law); *Soliz v. Plunkett*, 615 F.2d 272, 275 (5th Cir. 1980) (holding that the issue of whether the putative farm labor contractor "furnished" migrant workers to the farmers was a question of law).

suffice as a "fee" when paid to a person for services as a farm labor contractor. 29 C.F.R. § 41.5 (1982). This Court has no difficulty in viewing the consideration received by Tonche as a "fee" for the management and supervision of the workers. The record reveals no evidence of an agreement that Tonche's hourly wage was solely for chopping cotton;[35] moreover, even if Tonche's hourly wage were viewed as compensation for chopping, it would still constitute a "fee" within the meaning of the Act. Tonche's "chopping job" existed by virtue of his furnishing a crew for defendant, *i.e.*, Tonche furnished defendant with a crew because of defendant's offer of a steady chopping job for Tonche and his family. Tonche's wages constituted a "fee" for his services; Tonche was a farm labor contractor within the meaning of the statute.

B*Intentional Violation*

[9] 7 U.S.C. § 2050a(b) provides for either actual damages or liquidated damages[36] of up to $500[37] for each intentional vio

[35]Indeed, defendant's argument that Tonche was paid an hourly wage for his labor chopping cotton, not for furnishing defendant with migrant workers to hoe the cotton, is reminiscent of his argument on the "employee" issue under the FLSA claim. *See supra*, note 13. Surely Congress could not have intended application of the FLCRA to depend on how the farmer characterizes his agreement with the farm labor contractor. Such an interpretation would be inconsistent with the remedial nature of the Act. *See Soliz*, 615 F.2d at 275 (5th Cir. 1980) (stating that the "Act should be broadly construed because it is remedial in nature"). Allowing compliance with the Act to rest on the farmer's characterization of his agreement with the farm labor contractor (he hired the farm labor contractor to perform a task, not to furnish the workers necessary for the performance of the task) would permit wholesale evasion of the Act.

[36]Plaintiffs in the instant case have requested liquidated damages.

[37]There is some dispute among district courts as to whether a court must award each plaintiff $500 per violation or may in its discretion award up to $500 per violation. *See Espinoza v. Stokely-Van Camp, Inc.*, 641 F.2d 535, 539 (7th Cir.), *overruled, Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1221 (7th Cir.), *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981). The sounder position espoused by the Seventh Circuit in *Joan of Arc*, 658 F.2d at 1224 is that § 2050a(b) permits a district court to award liquidated damages of up to $500 for each violation of the Act.

lation of the Act.[38] The term "intentional" within this section means "conscious or deliberate" and does not require a specific intent to violate the Act. *Joan of Arc*, 658 F.2d at 1224.[39] The standard for an intentional violation has also been referred to as "the common civil standard which holds a person liable for the natural consequences of his or her acts." *DeLeon v. Ramirez*, 465 F.Supp. 698, 705 (S.D.N.Y. 1979) (stating that the courts have adopted this interpretation because of the remedial purposes of the Act)..

Applying this standard of intentionality to the instant cases, this Court concludes that defendant's admission at trial establishes that his violation of section 2050c (failure to maintain payroll records on plaintiffs) was intentional within the meaning of section 2050a(b). In response to questions by plaintiffs' attorney, defendant admitted that in both 1977 and 1978 when Tonche started working for him, he asked Tonche if Tonche had a card "to pay him with" and that Tonche showed defendant his farm labor contractor identification card.[40] Defendant's testimony establishes that he was aware of the existence of a law requiring farm labor contractors to carry identification cards in order to be paid. Under the intentionality standard of section 2050a(b) defendant is held liable for the natural consequences of his acts. Defendant's own testi-

[38]7 U.S.C. § 2050a(b) provides in pertinent part as follows:

> If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief.

[39]The Seventh Circuit in *Joan of Arc* upheld the district court's finding that defendant's "harmless technical" violation of the Act fell within the meaning of the term "intentional." The defendant in that case was a farm labor contractor who did not have a specific intent to violate the FLCRA. His violation consisted of inadvertently not applying for registration with the DOL until April 1978 although the DOL and the Texas Employment Commission had earlier approved defendant's recruitment of migrant workers which began in late 1977.

[40]*See* defendant's quoted testimony, *supra*, note 33.

mony reveals that his failure to keep payroll records on the individual plaintiffs was intentional within the meaning of the Act.[41]

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[41]Concluding that defendant's violation was intentional is especially appropriate in view of the fact that Tonche's farm labor contractor activities were performed exclusively for defendant. Allowing the farm operator to "go untouched" in such circumstances "could lead to the full scale eviscer-ation of the Act." *See DeLeon*, 465 F.Supp. at 705 (involving a failure to require that the farm labor contractor be validly registered).

Such a conclusion is also appropriate given that the recordkeeping obligation imposed (by the 1974 amendments to the Act) on farmers who use contractors was part of an attempt by the legislature to provide a more effective enforcement mechanism for violations of the Act. *See* S.Rep. No. 1295, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad.News 6441, 6443 & 6445-46.

Furthermore, the standard this Court has adopted for an intentional violation is particularly appropriate in light of the interrelationship between the FLCRA and the FLSA — the former can be used to enforce rights conferred by the latter:

> In addition to helping the farmworker remedy FLCRA violations, the FLCRA requirements aid the farm worker under other federal statutes. For example, FLCRA interrelates with the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1976), to provide important protections and remedies for farmworkers. Although FLSA requires all agricultural employers to maintain payroll records showing the hours worked and the wages paid, *id* § 211(c); Records To Be Kept By Employers, 29 C.F.R. § 16.33 (1980), it contains no private enforcement mechanism if the employer fails to maintain such records. Since workers rarely keep similar records on their own, farmworker minimum wage actions under FLSA § 206 usually dissolve into swearing matches in which farmworkers are at a great disadvantage. FLCRA, however, requires contractors and users of contractors to maintain the payroll records prescribed by FLCRA itself and payroll records required by *any other federal statute* 7 U.S.C. § 2050c (1976). Thus the FLCRA $500 penalty per violation can be used to address the failure to maintain FLSA records. *See, e.g., Cantu v. Owatonna Canning Co.*, 90 Lab.Cas. ¶33,968 (D.Minn. 1980). An employer forced to maintain proper payroll records is not likely to maintain records showing him to be guilty of minimum wage violations. Thus, he is deterred from committing FLSA violations. In this manner FLCRA functions to enforce rights created by, but unenforceable under FLSA.

Note, A Defense of the Farm labor Contractor Registration Act, 59 Tex.L.Rev. 531, 537 n. 61 (1981).

C. *Conclusion*

This Court has concluded that the record establishes as a matter of law that defendant used a farm labor contractor, that defendant violated the FLCRA by not maintaining payroll records on plaintiffs, and that defendant's violations were intentional within the meaning of the Act. On remand, the district court must determine the number of violations defendant has committed,[42] and may, in its discretion, award each plaintiff liquidated damages of up to $500 per violation.[43]

This Court reverses and remands for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

HIGGINBOTHAM, Circuit Judge, specially concurring:

I concur, but add this note, not for qualification but for caveat. Our efforts to justify appellate review by attempting to separate intertwined subsidiary facts and ultimate legal conclusions inevitably cast surrealistic shadows. The exercise can, and occasionally does, do little more than serve as a covering cape for the exercise of the trial court function by an appellate court. That transfer can frustrate assignments of institutional responsibility and deny efficacy to the Seventh Amendment.

I do not here need the comfort of the exercise. Genuinely undisputed facts at trial permit no conclusion but that Manuel Tonche was Ercell Givens' employee, or that Givens' conduct was wilful under *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d

[42]Section 2050c requires defendant to maintain both FLCRA payroll records and FLSA records. On remand, the district court must decide whether defendant's failure to maintain these records constitutes one or more violations.

[43]In deciding on the amount of liquidated damages to award per violation, the district court should keep in mind that, although plaintiffs did not prove out-of-pocket losses on their FLCRA claim, they were clearly prejudiced by defendant's failure to maintain records in their ability to establish their FLSA wage claims.

1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972).

[U.S. COURT OF APPEALS FILED JUN 16 1983
GILBERT F. GANUCHEAU CLERK]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1520

PAULINA CASTILLO, ET AL., Plaintiffs-Appellants,
versus
ERCELL GIVENS, Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING
(JUNE 16, 1983)

Before THORNBERRY, JOHNSON and HIBBINGOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Amy Johnson
United States Circuit Judge

CLERK'S NOTE: SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

[U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED JUN 19 1981 JOSEPH McELROY, JR., CLERK BY George Brookshea Deputy]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

CIVIL ACTION NO. CA-5-80-16

PAULINA CASTILLO, et al., Plaintiffs,
v.
ERCELL GIVENS, Defendant.

JUDGMENT

The above case came on for trial before the court and a jury on the 15th day of June, 1981 with all parties and attorneys present. After hearing and considering the evidence, the argument of counsel and the instructions of the court, the jury did on this 19th day of June, 1981 return its verdict in open court, and a decision having been reached.

It is Ordered, Adjudged and Decreed that the plaintiffs, and each plaintiff who is a party to this suit, do have and recover nothing of and from the defendant, Ercell Givens, and that all relief prayed for by the plaintiffs is denied.

All costs are taxed against the plaintiffs.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 19th day of June, 1981.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

[U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED OCT 7 1981 JOSEPH McELROY, JR., CLERK BY Kristy Chandler Deputy]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

CIVIL ACTION NO. CA-5-80-16

PAULINA CASTILLO, et al., Plaintiffs,
v.
ERCELL GIVENS, Defendant.

ORDER

This case came on for trial before the court and a jury on the 15th day of June, 1981. On June 19, 1981 the jury returned its verdict in open court and judgment in accordance with the verdict was entered that plaintiffs recover nothing from the defendant, Ercell Givens.

The plaintiffs have subsequently filed a motion to alter judgment, for judgment notwithstanding the verdict and for partial new trial. After considering this motion and the briefs of counsel, the court enters the following order:

At the close of the testimony, plaintiffs moved for a directed verdict on the ground that no fact issue existed with respect to any of the issues submitted to the jury. Plaintiffs argue that since they were entitled to a directed verdict, the jury's findings against them should be set aside, judgment entered for the plaintiffs and damages awarded accordingly. With respect to the issues concerning the Fair Labor Contractor Registra-

tion Act (FLCRA), 7 U.S.C. §§ 2041-55, plaintiffs assert the right to a jury trial did not exist, and the court should set aside the answers to such issues and enter judgment for the plaintiffs. Alternatively, plaintiffs request a new trial on the amount of damages. This partial new trial would be in the event the court could not grant judgment in accordance with the minimum number of hours which plaintiffs claim to have worked.

FAIR LABOR STANDARDS ACT

In order to prevail under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*, plaintiffs were required to show by a preponderance of the evidence that during the 1977 and 1978 agricultural seasons 1) plaintiffs were engaged in the production of goods for commerce, 2) plaintiffs were "employees" of the defendant Ercell Givens, and 3) defendant failed to pay the plaintiffs the minimum wage required by law. The jury answered the special issues pertaining to the requirements of the FLSA and determined that plaintiffs were not engaged in the production of goods for commerce (Special Issue 1) and plaintiffs were not employees of Ercell Givens (Special Issue 2).

It appears that the jury's finding on special issue number one relating to the production of goods for commerce is not supported by the evidence. However, even if plaintiffs prevail on this issue, there is sufficient evidence to support the jury's finding that plaintiffs were not employees of the defendant. Accordingly, this finding would preclude plaintiffs' recovery under the FLSA.

The evidence presented by each party was conflicting particularly in regard to the nature and degree of control of defendant over the plaintiffs and whether the plaintiffs depended on the defendant or Manuel Tonche for their livelihood. Because such evidence was of the quality and weight that reasonable and fair-minded men in the exercise of impar-

tial judgment could have reached different conclusions, the issue was properly submitted to the jury. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). Since it was appropriately within the jury's province to determine the employment issue and since there was sufficient evidence to support their conclusion, this court must uphold the finding that plaintiffs were not employees of the defendant.

FAIR LABOR CONTRACTOR REGISTRATION ACT

Plaintiffs first contend that these particular issues should have been determined by the Court contending that the right of jury trial did not attach. Although the plaintiffs sought only the liquidated damages of $500.00 per violation provided by the FLCRA as opposed to proving actual damages, various questions of fact existed in deciding the liability issues.

The FLCRA provides that any person furnished with migrant workers who are paid by a farm labor contractor shall maintain certain records. The FLCRA further defines "migrant workers" as individuals whose primary employment is agriculture or who performed agricultural labor on a seasonal or other temporary basis. A "farm labor contractor" is defined as a person, who for a fee, either for himself or on behalf of another person recruits, solicits, hires, furnishes, or transports migrant workers for agricultural employment. The term "fee" includes any money or other valuable consideration paid or promised to be paid.

As demonstrated by the above definitions, the determination of whether the FLCRA applied to these plaintiffs required the resolution of numerous questions of fact. Therefore, the issues were properly submitted to the jury as the finder of fact.

Plaintiffs further contend that the FLCRA should have been decided in their favor as a matter of law. The jury's answers to the relevant issues were that plaintiffs were not migrant workers (Special Issue 6) and that Manuel Tonche

was not a farm labor contractor (Special Issue 7). It appears that the evidence concerning plaintiffs' status as migrant workers did not support the jury's answer to special issue six. However, the evidence does support the answer in special issue seven and such finding would prevent recovery under the FLCRA.

As defined above, a farm labor contractor is one *who for a fee* recruits migrant workers. The only evidence of compensation paid to Manuel Tonche was that he received the identical hourly wage paid to the other plaintiffs, and there was no evidence that he received any other compensation or fee, but rather that the compensation he received was not as a fee for recruiting and furnishing migrant workers, but was payment for the services he performed as an hourly paid laborer. Reasonable minds could have differed as to whether this compensation was a "fee" as defined in the Act and thus, submission of this issue to the jury was warranted. Likewise, there was substantial evidence to support the jury's ultimate finding that Manuel Tonche was not a farm labor contractor.

Therefore, plaintiffs' motion to alter judgment, for judgment notwithstanding the verdict, and for partial new trial is DENIED. The judgment entered June 19, 1981 will stand as the judgment of this court.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 7th day of October, 1981.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

29 U.S.C. § 203. Definitions

As used in this chapter—

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an

employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organizations.

(e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

29 U.S.C. § 206. Minimum wage

Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the

minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b) of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this chapter as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this chapter to employees employed in American Samoa as pertain to special industry com-

mittees established under section 205 of this title with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraphs (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

29 U.S.C. § 211. Investigations, inspections, records, and homework regulations

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

29 U.S.C. § 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after May 14, 1947 — may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

7 U.S.C. § 2042. Definitions

As used in this chapter—

(b) The term "farm labor contractor" means any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers (excluding members of his immediate family) at any one time in any calendar year for interstate agricultural employment. Such term shall not include (1) any nonprofit charitable organization, public or nonprofit private educational institution, or similar organization; (2) any farmer, processor, canner, ginner, packing shed operator, or nurseryman who engages in any such activity for the purpose of supplying migrant workers solely for his own operation; (3) any full-time or regular employee of any entity referred to in (1) or (2) above; or (4) any person who engages in any such activity for the purpose of obtaining migrant workers of any foreign nation for employment in the United States, if the employment of such workers is subject to (A) an agreement between the United States

and such foreign nation, or (B) an arrangement with the government of any foreign nation under which written contracts for the employment of such workers are provided for and the enforcement thereof is provided for in the United States by an instrumentality of such foreign nation.

(c) The term "fee" includes any money or other valuable consideration paid or promised to be paid to a person for services as a farm labor contractor.

7 U.S.C. § 2045. Obligations and prohibitions

Every farm labor contractor shall—

(e) in the event he pays migrant workers engaged in interstate agricultural employment, either on his own behalf or on behalf of another person, keep payroll records which shall show for each worker total earnings in each payroll period, all withholdings from wages, and net earnings. In addition, for workers employed on a time basis, the number of units of time employed and the rate per unit of time shall be recorded on the payroll records, and for workers employed on a piece rate basis, the number of units of work performed and the rate per unit shall be recorded on such records. In addition he shall provide to each migrant worker engaged in interstate agricultural employment with whom he deals in a capacity as a farm labor contractor a statement of all sums paid to him (including sums received on behalf of such migrant worker) on account of the labor of such migrant worker. He shall also provide each such worker with an itemized statement showing all sums withheld by him from the amount he received on account of the labor of such worker, and the purpose for which withheld. The Secretary may prescribe an appropriate form for recording such information.

7 U.S.C. § 2048. Penalties

Any farm labor contractor or employee thereof who willfully and knowingly violates any provision of this chapter or any regulation prescribed hereunder shall be fined not more than $500.

No. 83-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERCELL GIVENS,

Petitioner,

v.

PAULINA CASTILLO, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

EDWARD J. TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
P.O. Box 2223
Hereford, Texas 79045
(806) 364-3961
Attorney for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

The Respondents, Paulina Castillo, et al., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit Court of Appeals opinion entered May 6, 1983, sub nom. *Paulina Castillo, et al.* v. *Ercell Givens*, 704 F.2d 181 (5th cir. 1983).

STATEMENT OF THE CASE

This action was brought by 44 migrant farm workers[1] who hoed weeds from Petitioner Ercell Givens' cotton

[1] Petitioner omitted the names of five workers from his petition: Manuel Pantoja, Rosalinda Pantoja, Margarita Pantoja, Pauline Pantoja, and Pauline Sue Pantoja Soto. These five workers were unable to attend trial, but their claims remain viable on remand.

fields in 1977 and 1978. Petitioner paid his cotton hoers $1.65 per hour in 1977, when the federal minimum was $2.20. When the FLSA minimum was raised by $.40 per hour in 1978, Petitioner only increased his wages by $.10 per hour to $1.75. In February, 1980, the Respondent farm workers filed suit against Defendant Givens in the Northern District of Texas, alleging that he had failed to pay them the minimum wage in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206, and had failed to maintain wage records of their work as required by the Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. § 2050c. The case was tried to a jury and judgment was entered for Petitioner based on the jury's answers to nine interrogatories. The Fifth Circuit Court of Appeals reversed, holding that undisputed facts established Petitioner's liability for both the FLSA minimum wage claim and the FLCRA record-keeping claim. The court of appeals found Petitioner's violation of FLSA was wilfull as a matter of law. It also found that the district court committed plain error in its instructions to the jury regarding the hours of work performed by Respondents. The court of appeals remanded the case to the district court for a new trial of the number of hours and for assessment of FLCRA and FLSA damages.

REASONS FOR DENYING CERTIORARI

A. The Fifth Circuit Opinion Does Not Conflict With Opinions Of This Court Or Other Courts Of Appeal

The court of appeals found that the facts of this case were genuinely undisputed and that those undisputed facts established Petitioner's liability as a matter of law. In reaching this conclusion of law the court correctly applied well-settled FLSA case law. Petitioner does not claim, nor can he, that any of the appeals court's rulings of law conflict with any decision of this Court or with any

decision of another court of appeals addressing the same issues. Similarly, the court of appeals' rulings of law with respect to the Farm Labor Contractor Registration Act are fully consistent with every other federal appeals court decision to have addressed those same FLCRA issues. A brief examination of each of the questions for review bears out the conclusion that the court of appeals opinion raises no novel questions or conflicts of law.[2]

Question 1: Petitioner argues that Respondent Manuel Tonche cannot simultaneously be an employee for purposes of FLSA and a farm labor contractor for purposes of FLCRA. However, there is nothing inconsistent in this finding. FLSA and FLCRA are distinct statutes, each with its own definitional structure. *Compare* 29 U.S.C. § 203 with 7 U.S.C. § 2042. Independent contractor status for purposes of FLSA is entirely different from and unrelated to farm labor contractor status for purposes of FLCRA. *Rivera* v. *Adams Packing Co.*, 707 F.2d 1278

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[2] Although the court of appeals reversed the jury because the facts were undisputed, the jury verdict was also reversible because it was clearly the product of confusion, bias, or other improper motive. For example, even though Petitioner conceded in his closing argument that Respondents were engaged in the production of goods for commerce [Tr. 812-813], the jury found that Respondents were not so engaged [Special Issue 1] [The district court found there was no evidence to support this jury finding]. The jury also found that the Respondents who hoed cotton fields during the summer were not "migrant workers" [Special Issue 6] even though the court's instructions defined that term to include persons "who perform agricultural labor on a seasonal or other temporary basis." [R.312] [The district court also rejected this jury finding]. In Special Issue 8 the jury found that Petitioner *did* maintain elaborate wage records of each Respondent despite the fact that Petitioner admitted on the stand that he kept no wage records whatsoever [Tr. 210-211, 279]. The jury's findings with regard to hours of work were completely at odds with the evidence as well. See footnote 4, infra.

(11th Cir. 1983); *Marshall* v. *Presidio Valley Farms, Inc.*, 512 F.Supp. 1195, 1197 (W.D. Tex 1981). Under FLCRA, a farm labor contractor is defined as a person who engages in contracting activity for a fee. This definition includes all persons who engage in such activity, whether or not they are employers, employees or independent contractors for FLSA purposes. 7 U.S.C. § 2042(b). FLCRA anticipates that some farm labor contractors will also be farm employees. Pursuant to § 2042(b)(3) certain farm employees who engage in contracting on no more than an incidental basis are exempt from registering as farm labor contractors. By implication, farm employees who engage in contracting for a fee on more than an incidental basis must register as labor contractors despite their employee status. Manuel Tonche was just such an employee-labor contractor. See *Marshall* v. *Buntings Nurseries, Inc.*, 459 F.Supp. 92, 100 (D.Md. 1978); *Usery* v. *Golden Gem Growers*, 417 F.Supp. 857, 862 (M.D. Fla. 1976); *Presidio Valley Farms, Inc.*, *supra*.

Question 2: The employment relationship in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947) is indistinguishable from that between Petitioner and Manuel Tonche, and the holding in that case compels a finding that Manuel Tonche was an employee of Petitioner. The petition for certiorari relies on a few isolated factors to argue that Tonche was an independent contractor. However, *Rutherford Foods* makes clear that employee status is not to be determined by isolated factors, but by the circumstances of the whole activity. *Id.* at 730. The undisputed circumstances in this case, regarded as a whole, "permit no conclusion but that Manuel Tonche was Ercell Givens' employee." 704 F.2d at 199 (Higgenbotham, J., concurring). The court of appeals' decision that the factors cited by Petitioner were insufficient to alter Tonche's

status as an employee followed both Supreme Court and Fifth Circuit precedent. *Goldberg* v. *Whitaker House Coop*, 366 U.S. 28 (1961) (freedom to set own hours of work consistent with employee status); *Rutherford Food*, *supra* (leader of crew with authority to hire, fire and pay crew members is an employee); *Fahs* v. *Tree Gold Crop Growers of Florida*, 166 F.2d 40, 44 (5th Cir. 1948) (same); *Usery* v. *Pilgrim Equipment*, 527 F.2d 1308 (5th Cir. 1976) (worker with right to hire and pay assistants is employee); *Mednick* v. *Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir. 1975) (worker with the right to hire, fire, and pay sub-employees is himself an employee not an independent contractor). There is simply no support in law or fact for Petitioner's claim that an illiterate cotton hoer who acted as crew foreman, but who was told by Petitioner which weeds to hoe and what fields to work in, and who worked exclusively for Petitioner for the same $1.65 per hour paid to all of Petitioner's other cotton hoers, was an independent business man exercising the initiative, judgment, or foresight of the typical independent contractor. *Rutherford Foods*, supra. The court of appeals' conclusion that Manual Tonche was an employee of Petitioner was compelled by twenty-five years of FLSA precedent and does not merit review by this Court. *Cf. Hodgson* v. *Griffin and Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973), cert. den. 414 U.S. 818.

Question 3: The Petitioner complains that the court of appeals erroneously applied a "knew or should have known" definition of wilfullness for purpose of FLSA, 29 U.S.C. § 255. However the definition applied by the court adheres to the standard set forth in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), cert. den. 409 U.S. 948 (1972), and other Fifth Circuit precedents, *Brennan* v. *Heard*, 491 F.2d 1, 3 (5th Cir. 1974); *Marshall* v. *A & M Consolidated Indep. School*

Dist., 605 F.2d 186, 191 (5th Cir. 1979). Moreover, a "knew or should have known" definition of wilfullness, far from being a departure from settled law as argued by Petitioner, has been adopted by at least five other circuit courts. *Marshall* v. *Erin Food Service, Inc.*, 672 F.2d 229, 231 (1st Cir. 1982); *Donovan* v. *Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2nd Cir. 1983); *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109, 1113-1114 (4th Cir. 1981); *Marshall* v. *Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1092 (9th Cir. 1981); *Mistretta* v. *Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980). See also *Marshall* v. *Root's Restaurant, Inc.*, 667 F.2d 559, 561 (6th Cir. 1982).

Question 4: Petitioner argues that the court of appeals applied an erroneous standard for determining whether Petitioner's violation of FLCRA was "intentional." See 7 U.S.C. § 2050a. However, the definition of "intentional" adopted by the court is identical to that adopted by every other circuit to have addressed the issue. *Alvarez* v. *Joan of Arc*, 658 F.2d 1217 (7th Cir. 1981); *Alvarez* v. *Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983); *Rivera* v. *Adams Packing Co.*, 707 F.2d 1278, 1283 (11th Cir. 1983). These cases hold, as did the court below, that an "intentional" violation does *not* require a specific intent to violate FLCRA. Rather, all that need be shown is that the act which constitutes or causes the violation was a conscious or deliberate act. By his own admission, Petitioner's decision not to keep wage records was a deliberate and conscious decision and was, therefore, intentional for purposes of FLCRA.[4]

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[4] In response to a question from his own attorney Defendant stated, "it wasn't my intention to keep up with any records, and I never did during the time [Manuel Tonche] worked for me." [Tr. 278-279].

Questions 5 and 6: The district court's instruction with respect to the burden of proof for determining the hours of Respondents' work was clearly erroneous in light of the standard set forth in *Anderson* v. *Mt. Clemons Pottery Co.*, 328 U.S. 680 687-688 (1945) and Fifth Circuit precedent, *Skipper* v. *Superior Dairies*, 512 F.2d 409, 420 (5th Cir. 1975); *Shultz* v. *Hinojosa*, 432 F.2d 259, 261 (5th Cir. 1970). The court of appeals concluded that the error could have affected the verdict and, therefore, properly remanded the case for a new trial of the hours of work. Petitioner does not contest the court's ruling with respect to the burden of proof; he merely argues that the instruction given by the district court was adequate. However, the record leaves no doubt that the instruction given was not clear, and that the jury was confused about the burden of proof to Respondents' detriment.[4]

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[4] Despite Petitioner's failure to impeach Respondents' testimony, 704 F.Ed at 195 n. 29, the jury found that twenty-one of the Respondents worked zero hours during the time Respondents testified they were working. For example, Plaintiff Refugia Gamez testified that she worked the whole season in both 1977 and 1978 [Tr. 601-604]. The Defendant made no attempt to contradict or impeach her testimony on cross examination or through other evidence [Tr. 606-607]. Nevertheless the jury found that Ms. Gamez did not work at all. Plaintiff Hilario Garcia testified that he and seven members of his family worked for two months in 1977. Nothing in Defendant's cross examination impeached that claim [Tr. 479-484]. Yet, the jury found no hours of work. This result cannot be explained as a credibility determination since the jury credited Mr. Garcia's testimony concerning work in 1978. Perhaps most surprising of all was the jury's conclusion that while some of the crew members worked more than 290 hours in 1977, Manuel Tonche, the man who supervised the crew every day, only worked 30 hours. That result is all the more strange in light of the fact that the jury found Manuel Tonche worked the most hours of any crew member in 1978. No theory of evidence can account for these findings or the findings with respect to the other plaintiffs. The court of appeals' decision to remand for a new trial of the hours of work was clearly supported by the record.

In sum, the court of appeals' opinion correctly applies settled law to undisputed facts. Petitioner does not identify any novel question of law or conflict in decisions which would warrant consideration by this Court.

B. The Issues Involved In This Case Do Not Warrant Consideration By This Court.

The Farm Labor Contractor Registration Act was repealed effective April 13, 1983. It was replaced by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. § 1821 et seq., which utilizes a different definitional structure from FLCRA. It would serve no purpose to grant certiorari to interpret a moribund statute. Nor would it serve any purpose to review the FLSA issues in this case, all of which are matters of well-settled law.

C. Petitioner Seeks To Have This Court Weigh Facts Applicable Only To The Litigants In This Case.

The petition for certiorari seeks to have this Court review the individual facts of this case. The Fifth Circuit found the facts to be genuinely undisputed. Petitioner argues that the court of appeals invaded the province of the jury by making credibility determinations and by ignoring "ample and abundant evidence" in support of the jury's verdict. Petitioner's argument is without merit. Nowhere in his petition does he cite a single disputed fact or instance where the court of appeals made credibility determinations.[5] More importantly, it is contrary to the public interest for this Court to exercise certiorari jurisdiction to sift through the facts of this case to deter-

[5] The facts were undisputed for the simple reason that none of the Respondents had personal knowledge of the relevant facts other than their hours of work. Only the Petitioner and Manuel Tonche knew the terms of their work agreement and the Petitioner's record keeping

mine the extent to which they are "undisputed" or "ample and abundant." It is clear from the Fifth Circuit's detailed opinion that the court conducted an exhaustive review of the evidence before reaching its conclusion that the facts were undisputed. The court of appeals' decision is fair and just. A further review of the evidence by this Court would affect no one other than the parties to this litigation, have no precedential value, and serve no purpose.

CONCLUSION

For all of the foregoing reasons the petition for a writ of certiorari to review the opinion of the Fifth Circuit Court of Appeals should be denied.

Respectfully submitted,

EDWARD J. TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
P.O. Box 2223
Hereford, Texas 79045
(806) 364-3961
Counsel for Respondents

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practices. Because Tonche died before trial, Respondents had to rely entirely on Petitioner's testimony on these issues. The Fifth Circuit's opininon is, as a result, based almost exclusively on the Petitioner's admissions.